

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: ) Case No. 01-01139 (JKF)  
 ) (Jointly Administered)  
W.R. GRACE & CO., et al., )  
 ) Multipurpose Room  
 ) 824 Market Street  
Debtors. ) Wilmington, Delaware 19801  
 )  
 )  
 ) July 22, 2008  
 ) 9:33 A.M.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY JUDGE

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1                   THE COURT: Okay. That takes us back to W.R. Grace,  
2 Bankruptcy Number 01-11139. The parties I have listed to  
3 appear by phone are Marion Fairey, Gregory Boyer, Christina J.  
4 Kang, James Restivo, Andrew K. Craig, Alan Runyan, Arlene  
5 Krieger, Debra Felder, Robert Horkovich, Edward J. Westbrook,  
6 Roger Frankel, Alex Mueller, Daniel Speights, Walter Slocombe,  
7 Peter Lockwood, Marti Murray, Elizabeth Cabraser, Jennifer  
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9 Baena, Douglas Cameron, Elizabeth Devine, Jay Sakalo, Mark  
10 Shelnitz, Terence Edwards, Richard Levy, David Bernick,  
11 Jacqueline Dais-Visca, Matthew Kramer, Janet Baer, Martin Dies,  
12 Joseph Schwartz, Robert Givone, Melanie Schmid, Lisa Esayian  
13 and -- oh, that's all.

14                   I'll take entries in court. Good morning.

15                   MR. BERNICK: David Bernick for W.R. Grace.

16                   MR. WESTBROOK: Good morning, Your Honor. Ed  
17 Westbrook for the Barbanti ZAI certified class.

18                   MR. SCOTT: Good morning, Your Honor. Darrell Scott  
19 on behalf of the certified Barbanti class action.

20                   MR. SAKALO: Good morning, Your Honor. Jay Sakalo on  
21 behalf of the Property Damage Committee.

22                   MR. KRAMER: Good morning, Your Honor. Matt Kramer  
23 also on behalf of the Property Damage Committee.

24                   MR. HURFORD: Mark Hurford for the ACC.

25                   MR. WYRON: Good morning, Your Honor. Richard Wyron

1 for the FCR.

2 MS. CABRASER: Good morning, Your Honor. Elizabeth  
3 Cabraser for the Barbanti Class.

4 MR. PASQUALE: Good morning, Your Honor. Ken  
5 Pasquale for the Unsecured Creditors' Committee.

6 MR. HOGAN: Good morning, Your Honor. Daniel Hogan  
7 for the Canadian ZAI claimants.

8 MR. TACCONELLI: Good morning, Your Honor. Theodore  
9 Taccconelli for the Property Damage Committee.

10 MR. ALLINSON: Good morning, Your Honor. Elihu  
11 Allinson for the ZAI claimants.

12 MR. O'NEILL: Good morning, Your Honor. James  
13 O'Neill on behalf of Grace.

14 THE COURT: Did I get everyone?

15 (No audible response heard)

16 THE COURT: Mr. Westbrook, Mr. -- are you starting?

17 Okay.

18 MR. WESTBROOK: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. WESTBROOK: Your Honor, Ed Westbrook appearing  
21 this morning on behalf of the certified -- previously certified  
22 Barbanti class action.

23 Your Honor, I have with me this morning Mr. Darrell  
24 Scott, who is well known to the Court from his prior  
25 appearances. And Mr. Scott and I are pleased to have with us

1 this morning Ms. Elizabeth Cabraser from Lieff Cabraser firm in  
2 San Francisco. Ms. Cabraser is a well known advocate on class  
3 action matters, has appeared in numerous state and federal  
4 panels on class actions, and she is going to join us in  
5 presenting this morning.

6 Your Honor, to use our time most efficiently, we've  
7 divided our presentation into three parts. I'm going to give a  
8 brief historical perspective --

9 MR. BERNICK: I'm sorry, Ed. Can we know whether Mr.  
10 Scott and Ms. Cabraser are -- are also appearing on behalf of  
11 the -- what they call to be the certified Barbanti class?

12 MR. WESTBROOK: Yes, they are. Ms. -- Ms. Cabraser  
13 was an original co-counsel with us in Barbanti.

14 MR. BERNICK: Thank you.

15 MR. WESTBROOK: Your Honor, I'm going to give a brief  
16 historical perspective to put the Barbanti class into some  
17 focus. Mr. Scott will talk about the specific of the motion  
18 today, and Ms. Cabraser will add some comments on how Barbanti  
19 could perhaps fit into an overall resolution of ZAI, which is  
20 near and dear to all of our hearts.

21 Your Honor, as to the background, in this bankruptcy,  
22 over a time, I've heard some comments from Grace attempting to  
23 cast class actions as perhaps an unfair device, a tool as  
24 plaintiffs' lawyers use to put unfair leverage, we've heard  
25 that term, on the debtor. And whatever may be the case in

1 other circumstances, Your Honor, in my experience, class  
2 actions in asbestos property damage have been very useful  
3 tools. We think they can be a useful tool in this bankruptcy  
4 to resolve the ZAI situation.

5 Your Honor, I've prepared a few demonstratives to  
6 help move us along. First, Your Honor, is the role of class  
7 actions in asbestos property damage, and resolving asbestos  
8 property damage. And, Your Honor, I think it tells us a few  
9 things. When Grace filed for bankruptcy, the Court may have  
10 wondered why there weren't more asbestos property damage cases  
11 pending against it. And part of the reason is that Grace had  
12 settled a large number of its claims prior to bankruptcy  
13 through class actions. We had the school asbestos litigation  
14 which settled 36,000 school districts, about 14,000 of whom  
15 were estimated to have asbestos, settled by Grace, never got to  
16 this Court.

17 The Detroit Board of Education case was a Michigan  
18 statewide class action settled for over 300 schools.  
19 Kirbyville, down in Texas, Mr. Dies' cases, class action  
20 included cities, counties, hospitals, and state buildings.  
21 Over 800 claimants, never had to be individually addressed, and  
22 the Prince George Center case, which was a group of private  
23 office buildings leased to the federal government.

24 In addition, Your Honor, we have the Central  
25 Wesleyan; Your Honor is familiar with the Central Wesleyan

1 case. I'm counsel in that case. We settled it with Grace just  
2 before its bankruptcy, so it did not come to this Court or you  
3 would have had 3,000 more claims of the college's.

4                   But of particular relevance here, Your Honor, Central  
5 Wesleyan was not settled with U.S. Gypsum before its  
6 bankruptcy, and we brought that case into the U.S. Gypsum  
7 bankruptcy. Your Honor will recall U.S. Gypsum took the same  
8 position Grace is taking today. That is you shouldn't  
9 recognized a previously certified class, that the class action  
10 was a run around the bar date, that it wouldn't advance  
11 matters, it would just complicate matters. We filed briefs, we  
12 got to the precipice, and then -- and from our perspective,  
13 U.S. Gypsum got reasonable, from their perspective we got  
14 reasonable. And we were able to present to the Court a  
15 settlement for the previously certified class that resolved all  
16 those claims. You lifted the stay, we were able to effectuate  
17 that settlement through the class action.

18                   My point, Your Honor, not to belabor it, is that  
19 class actions are not some four-letter word in bankruptcy.  
20 Class actions can help to achieve bankruptcy objectives.

21                   Your Honor, there's an interesting case, In Re:  
22 CommonPoint Mortgage out of the Western District of Michigan,  
23 Chief Judge Gregg, in which he analyzes, in some detail, the  
24 benefit that class actions can have in bankruptcy. And I want  
25 to just run through a few of those points as it relates to

1 what's coming up here in Barbanti. Chief Judge Gregg said that  
2 "Class actions are not inimicable to bankruptcy, they fit well  
3 and harmonize with bankruptcy. Class actions serve the goals  
4 of efficiency, compensation, deterrence, and justice, which is  
5 off the screen. Efficiency, you get the common issues  
6 litigated once and for all. You have common counsel to speak  
7 for all, you can streamline settlement discussions, and you can  
8 resolve a large number of claims."

9 "As to compensation," and I think this is very  
10 important here, Your Honor. "Compensation" -- "The goal of  
11 compensation is to have all creditors, large and small, treated  
12 fairly." Compensation doesn't give unfair leverage to a class  
13 action. But, in our view, Your Honor, it levels that playing  
14 field.

15 With a class action, what you have for ZAI is a  
16 \$5,000 average claimant, homeowner in Pocatello, Idaho  
17 confronting Mr. Bernick and Mr. Restivo, and their cast of  
18 thousands. In our view, that's not a level playing field.

19 Small claims represented through a class action can  
20 get some compensation when we all know realistically in this  
21 courtroom that without a class action, many, many ZAI claims  
22 will not be pursued, homeowners will not go ahead.

23 Your Honor, deterrence, and Chief Judge Gregg said,  
24 "Deterrence is a lesser goal, but it's still a goal in class  
25 actions and in bankruptcy, especially in a reorganization case

1 because in a reorganization case, the debtor's going to go on  
2 with its business. You don't want a debtor to be able to know  
3 that it can injure a lot of people in small ways, and just move  
4 on and pay them nothing, reorganize."

5                   We've heard, Your Honor, and God bless them, that  
6 Grace's equity was \$100 million when they went into bankruptcy,  
7 it's now about a billion six. That's wonderful, Your Honor.  
8 But if they were to come out of bankruptcy with a billion six  
9 and said, you know what, we didn't pay ZAI much of anything  
10 because we were able to beat these folks down; that's not what  
11 the bankruptcy system is all about.

12                  And under justice, Your Honor, small claims can get  
13 legal representation, and they have a meaningful opportunity to  
14 participate. To say that a ZAI homeowner has just as much  
15 right as the banks to come in here and press its claim, well,  
16 on paper that sounds right. But in practicality, we all know  
17 that that's not correct.

18                  Your Honor, the ZAI class action, the Barbanti class  
19 action, and the ZAI class actions in general, can form an  
20 important part of the resolution of Grace's contaminated  
21 vermiculite liability. And they've made some strides already  
22 recently in getting this partially put to bed.

23                  Your Honor, this is a simplified scheme about the  
24 distribution of vermiculite mined at the living mine. It went  
25 through Libby where some of it was taken home and put into

1 homes, some of it blew into the neighborhoods, it was taken to  
2 expansion plants where it was expanded, and then in some  
3 instances, Your Honor, a lot of instances it went to lumber  
4 yards. I left it out because that's not a claimant.

5 But also we've discovered in the ZAI science  
6 discovery that some of the vermiculate was sold, in fact,  
7 directly by Grace to homeowners. So, this is the -- this is  
8 the simplified distribution scheme.

9 Grace still has got to deal with the mine, I  
10 understand. They've just recently taken care of their  
11 obligations in Libby, \$250 million paid immediately to the EPA.  
12 The vermiculate expansion plants contamination by vermiculate  
13 liability was taken care of in another settlement, \$44 million,  
14 about half of which, as far as we can figure out just for the  
15 vermiculate sites, there were some other environmental sites.  
16 So, we have left Libby mine, and we have left the ZAI homes.

17 Your Honor, and this is the overall picture, this is  
18 what we're --

19 THE COURT: Excuse me one second. What you're asking  
20 me to certify, though, is a Washington State class, correct?

21 MR. WESTBROOK: That's today's motion, Your Honor,  
22 yes.

23 THE COURT: Okay. A Washington State class isn't  
24 going to help me with Libby, Montana claims and ZAI homes.

25 MR. WESTBROOK: No, Your Honor, that's finished. My

1 point was --

2 THE COURT: The homes aren't. You just told me  
3 they're not.

4 MR. WESTBROOK: No, no. I'm sorry, Your Honor. The  
5 Libby homes are finished.

6 THE COURT: I thought you just said the ZAI Libby  
7 homes are not finished.

8 MR. WESTBROOK: No, no, I'm sorry, if I misspoke,  
9 Your Honor. The Libby homes and neighborhood, that has been  
10 resolved. That's part of the \$250 million payment. EPA was  
11 remediating the homes in Libby --

12 THE COURT: The homes and the neighborhood.

13 MR. WESTBROOK: Yes.

14 THE COURT: Okay.

15 MR. WESTBROOK: In addition to other areas, but they  
16 -- for about \$30,000 a home, they were spending to clean up the  
17 Libby homes.

18 THE COURT: All right.

19 MR. WESTBROOK: What we have left are non-Libby  
20 homes, I should call them.

21 THE COURT: All right.

22 MR. WESTBROOK: Okay. And then finally, Your Honor,  
23 as part of the overall resolution of Grace's asbestos toxic  
24 liability, what we have are a few blanks to be filled in.

25 First of all, on personal injury, Your Honor, they're

1 finished. Before bankruptcy, they paid about \$646 million. In  
2 bankruptcy, they've agreed to pay -- and this number, Your  
3 Honor, is -- is as close as we can get an estimate from  
4 somebody, two to two and a half billion dollars, for a total of  
5 2.6 to 3.2.

6                   Interesting, Your Honor, for traditional property  
7 damage, before bankruptcy, Grace had actually paid more to the  
8 property damage claimants than to the personal injury  
9 claimants. In this bankruptcy, the tail end of the traditional  
10 property damage claimants, Grace has agreed to pay about 82  
11 plus million. The number goes up as they settle, so we'll --  
12 so, that we have about three-quarters of a billion dollars they  
13 paid for traditional asbestos property damage.

14                   What we have left, Your Honor, the vermiculate  
15 contamination situation. Again, Libby mine, the homes and  
16 neighborhood, environmental sites and the ZAI homes. Before  
17 bankruptcy, they paid nothing for any of those, denying  
18 liability to all of those. In bankruptcy, they've now paid for  
19 the Libby homes, the neighborhood, they've paid for the  
20 environmental sites, the vermiculate plants.

21                   So, the question, Your Honor, is how do we get a  
22 number in here for the ZAI homes? This is what we're trying to  
23 resolve. Grace also has to resolve this, the Libby mine. They  
24 do that, they're done with their asbestos liability.

25                   We believe, Your Honor, and Mr. Scott's going to

1 speak to that in a minute, that the Barbanti class action is  
2 the first step in trying to put together a cohesive program to  
3 resolve the claims of these small homeowners who otherwise  
4 won't be on this chart.

5 Thank you, Your Honor.

6 THE COURT: Well, maybe I'm asking the wrong person,  
7 and if I am, Mr. Westbrook, you can defer the answer. But how  
8 is the Barbanti class going to solve all of the other ZAI home  
9 issues?

10 MR. WESTBROOK: Your Honor, I'm going to do exactly  
11 what you said. When Mr. Scott finishes, Ms. Cabraser's going  
12 to speak about that in some detail.

13 THE COURT: All right.

14 MR. SCOTT: The question the Court just asked is  
15 probably the most important question that will be asked today,  
16 and I'm confident the Court will have an answer to that  
17 question.

18 Elizabeth Cabraser, who has been class counsel on  
19 this case since prior to the filing of this case, is the person  
20 who can provide the Court with the most enlightening and,  
21 indeed, the most enlightened view of that subject matter. From  
22 my part, let me say this, and then proceed to what I would like  
23 to talk about.

24 The Barbanti class is a vehicle by which to give life  
25 to a equitable claim which we view as a vision for global

1 resolution. By demonstrating that the Washington class is  
2 meritorious procedurally and substantively, it will become  
3 apparent that that class should be expanded to a nationwide  
4 class, or procedurally that a sister class proof of claim,  
5 which covers all other classes, ought to be recognized because  
6 of the merit.

7           We have steadfastly believed that when this Court  
8 comes to understand the nature and the merit of these class  
9 proofs of claim, they will prove themselves factually and as a  
10 matter of law. And we're willing to go through that fight in  
11 order to establish it. But in order to go through the fight,  
12 you have to be able to bring a claim. And that's what is  
13 before the Court today.

14           I want to address just three things, and then turn  
15 the lectern over to Elizabeth Cabraser who, I think, will be of  
16 value to the Court in explaining how this motion is not an  
17 impediment toward finality of Zonolite claims, it is a -- a  
18 vehicle for resolution of those claims. I want to do three  
19 things:

20           Very briefly talk about the procedural history behind  
21 the Barbanti class action;

22           Secondly, I want to talk about what the motion is,  
23 and its merit;

24           And then very briefly, I want to talk about what the  
25 benefits are of granting the motion and what the risks are of

1 not granting the motion.

2                   The Barbanti class action was born in Spokane and in  
3 my office. It -- it was borne out of the very recent public  
4 disclosure that Zonolite was contaminating with asbestos,  
5 unlike traditional asbestos materials which contained asbestos  
6 for some purpose, this was a contamination problem. We  
7 recognized that these are claimants who are unknown, and who  
8 are almost certainly unknowing.

9                   We also recognized that the number of homes involved  
10 created such an intractable problem for the courts and for  
11 Grace that a meaningful collective resolution needed to be  
12 crafted. We brought a class action asserting an equitable  
13 claim, which sought prospective relief in order to avoid the  
14 prospects of future injury. We are trying to foreclose a third  
15 wave of asbestos litigation, this time dealing with the new  
16 subject of Zonolite.

17                  We brought an equitable claim seeking unified  
18 indivisible collective remedies which we thought would lower  
19 the expense to what is now a debtor, create actual remedies for  
20 actual people who have actual problems. Rather than just  
21 generate an exchange of monies with attorneys in between, and  
22 would avoid the prospects of the Washington courts, and if our  
23 MDL action were certified, all courts, from having to deal for  
24 the next two or three decades with Zonolite claims. We sought  
25 programmatic remedies that provided notification. Notification

1 to homeowners that the product was contaminated with asbestos,  
2 but also notification to the real estate industry that the  
3 product is contaminated with asbestos, including, for example,  
4 home inspection industry. Notification to trades persons who  
5 would likely encounter the material, potentially disturb it and  
6 contaminate living spaces, that it's contaminated with  
7 asbestos. In so doing, if we could prove to the court that  
8 there was a legal basis for them assuming that responsibility,  
9 it would avoid future liabilities.

10 Education: We recognize that no matter how you count  
11 the number of homes, if you multiply it by five or 10,000, the  
12 figure becomes so astronomical that it is -- you have to search  
13 for a different solution. Our solution was to avoid, where  
14 possible, the necessity of incurring the expense. An  
15 educational campaign that educated homeowners as to how to live  
16 with Zonolite, how to manage Zonolite in place so they don't go  
17 through the unnecessary expense of removing it when it needn't  
18 be removed, and they don't, at midnight, try to remove it  
19 themselves for fear of the value of their homes; a thing that,  
20 in fact, happens. Notification, education,  
21 remediation/abatement. We recognize that in -- in -- actually  
22 many homes, Zonolite is not locked away in an attic, it  
23 contaminates living spaces, and in ways that something needs to  
24 be done now, and it requires an asbestos abatement team. This  
25 is a programmatic remedy that provides the resources, financial

1 and personnel, to accomplish abatement where necessary, and  
2 remediation when necessary. For example, when there's  
3 remodeling of a home that -- that -- of necessity requires the  
4 disturbance of Zonolite, which creates an expense.

5           We fought through cross certification with W.R.  
6 Grace. It wasn't a drive-by certification. Mr. Restivo, Mr.  
7 Flatey (phonetic), Mr. Cameron, Grace counsel from New York,  
8 who was a class action specialist, all appeared, Grace's  
9 experts testified. The court put together a case management  
10 order, discovery directed at the class certification issue, the  
11 court had a large -- almost a full day hearing on the subject,  
12 took it under advisement for, I believe two months it was two  
13 months, and then issued a -- an order recognizing, certifying,  
14 establishing a Washington class as an entity. Not opt out  
15 because the -- the claim sought and the remedy sought was an  
16 indivisible thing. It was either a thing that was meritorious  
17 and owing to that community as a whole, or wasn't, and so it  
18 was a non-opt out 23(b)(2) class action, and she appointed Mr.  
19 Barbanti and ultimately Ralph Bush as the representatives for  
20 that class. She appointed me as lead class counsel, Elizabeth  
21 Cabraser and Mr. Westbrook were additional counsel. Mr.  
22 Westbrook having endlessly more experience in the field of  
23 asbestos and property damage claimants; Ms. Cabraser having  
24 endlessly more experience in complex matters involving both  
25 bankruptcy and class action, both of whom I invited because of

1 the importance of the litigation and its complexity.

2 We filed a federal action as a counterpart. Mr.  
3 Price, Mr. Prebble from Montana, who was in Missoula before the  
4 judge who will now preside over the criminal trial against W.R.  
5 Grace. That case was MDL'd to Boston before Judge Saris, class  
6 certification is briefed. Within two weeks of the hearing on  
7 class certification, bankruptcy occurred. And so there never  
8 was sort of the second shoe.

9 But our vision there gives this Court a vision as to  
10 how this can proceed even in bankruptcy. Our vision there was  
11 a Washington class, which can -- can be promptly brought and  
12 determined to be meritorious, can -- can be a vanguard  
13 demonstrating the merit of both the procedure and the remedy,  
14 and shedding light to the federal court on what it should do.  
15 And if we were wrong, it would be fatal to our federal action.

16 Bankruptcy occurs. First thing Mr. Barbanti and Mr.  
17 Bush do is move for a property damage claimant -- committee.  
18 Mr. Barbanti himself flew out to Wilmington, Delaware to appear  
19 at the meeting of the first creditors, advocating for the  
20 appointment of a committee and for himself as an appointee.  
21 And he was appointed as class representative, the U.S. Trustee  
22 appointed him. He's one of the only individuals I can say who  
23 actually, for the first couple of years, participated in the  
24 committee meetings as an actual participant. Mr. Barbanti and  
25 Mr. Bush have perpetually met with me to discuss the progress

1 of this Washington class in these bankruptcy proceedings, and  
2 they have been steadfast. They, at the inception of this  
3 bankruptcy, sought both recognition of their class and class  
4 certification. This Court deferred that issue to go through  
5 the science trial. And -- and -- and now, at the very first  
6 opportunity to re-raise that issue, we have. And they are now  
7 here on the present motion.

8                   What is the motion? This motion does not ask the  
9 Court to certify a class action. That's reflected in the  
10 pleadings, you might notice, which don't even address the  
11 elements of class certification. That's because this motion  
12 isn't a motion for certification. It is a motion for this  
13 Court to recognize the agency relationship between Ralph Bush  
14 and Marco Barbanti and the class they have an obligation to  
15 represent.

16                   It is a motion under Rule 303 that this Court merely  
17 say, Mr. Bush and Mr. Barbanti are, in fact, by virtue of a --  
18 an existing order, they are, in fact, agents of an existing in  
19 fact class in a case which is in fact pending, albeit stayed,  
20 in the State of Washington. They have the authority to file a  
21 claim, the exact claim they brought in that class action, in  
22 these bankruptcy proceedings. It is not a comment on the merit  
23 of that claim. It is not a comment on whether the class device  
24 ultimately will prove itself to be a valuable device in  
25 bringing finality to Zonolite claims. It is only a recognition

1 that the -- they have the authority to file a claim as agents  
2 of individuals they, in fact, represent.

3           And that if they are not permitted to file that  
4 claim, then that -- then there is no voice for those claimants,  
5 and that claim has no existence because it can only be brought  
6 collectively. And in this case, only through their  
7 representatives.

8           What is the merit of the motion? Why should a court,  
9 and -- or -- I didn't say when must a court -- at least  
10 recognize the authority of a existing representative to file a  
11 claim on behalf of the agent or the principal they represent.  
12 The opinion, In Re: Kraft, 2005 is -- is -- I think the most  
13 informative valuable case. It is a Bankruptcy Court decision  
14 2005 out of the Northern District of Texas. There's a variety  
15 of cases that deal with the subject as to whether a Bankruptcy  
16 Court can recognize a class and proceed on a class basis, and  
17 what are the factors that determine whether it ought to allow  
18 the class to proceed through bankruptcy. And quite often,  
19 those are cases where there was no pre-certified class.

20           There are a variety of other cases where there was a  
21 pre-certified class, but they're very unique circumstances.  
22 There was a judgment. And so it's really enforcement of a  
23 judgment, or some other anomaly isn't akin to this case.

24           In Re: Craft is -- is four-square this case. In Re:  
25 Craft, the court was presented with two motions: One,

1 presented by a pre-certified class, the other presented by a  
2 individual who sought to represent a class. The one motion was  
3 a motion for recognition of the class, and of the authority to  
4 file the claim, and no more. And the other was a motion for  
5 class certification.

6 And the court, embracing the In Re: American Reserve  
7 opinion, as most courts actually have, said, class device can  
8 be perfectly appropriate, that's not to say it is in all cases,  
9 but it can be. And, therefore, as to the existing class, do  
10 they have the authority to file a claim? And the court  
11 determined that under Rule 303, a -- a class certified by  
12 another court, and representatives appointed by another court,  
13 an existing order to that effect gives that representative the  
14 authority to file that claim on behalf of that class. The  
15 affect is the class is before the court. For better or worse  
16 of that class, they're here, and their claim can be determined  
17 not meritorious, meritorious, but they're at least before the  
18 court, and that's what the court determined. It's a certified  
19 class, they have authority to bring the class before the court.

20 As to the other, the court said it's a different  
21 analysis. Here I have to engage in Rule 23, I have to weigh  
22 the considerations as to whether it complicates the bankruptcy,  
23 we have to look at the Rule 23 elements itself, and didn't  
24 certify the other class. I - if I recall, it was because it  
25 was fairly late in the game, and it made things too complex.

1           We are only here asking that the Court recognize that  
2 Mr. Barbanti and Mr. Bush undertook an oath in the State of  
3 Washington, literally signed their names to a declaration that  
4 they would be fiduciaries for owners and occupies of homes in  
5 Washington. The court not only empowered them, but burdened  
6 them with the obligation of pursuing that claim, and me as  
7 counsel, and the only thing we are asking is that the Court  
8 open the courthouse door so that we can appear to do what we  
9 say we can do. Prove it's meritorious and prove it's best  
10 managed on a class basis.

11           And if we lose either of those two, due process was  
12 achieved because we have opportunity to be heard, which is all  
13 we are asking.

14           What happens if the Court recognizes the class?  
15 Well, counsel for Grace is perfectly skilled at contesting  
16 claims. And he has a proof of claim on behalf of a community  
17 of Washington homeowners and we defend that claim against  
18 whatever argument he wants to bring. He can bring a motion for  
19 decertification. He can bring a motion to lift stay to have  
20 the Washington Court of Appeals decertify. He can bring a  
21 motion saying the science trial wipes out the claim. He can  
22 bring a motion saying you're not entitled to this relief. And  
23 -- and we will defend that claim and prove not only  
24 substantively it's meritorious, but that the class device is  
25 the logical vehicle for providing a benefit to the debtors I'm

1 beginning to doubt they deserve, which is finality as to  
2 Zonolite.

3                   What happens if the Court doesn't recognize the  
4 motion in front the Court? Well, I don't have a client, Your  
5 Honor. You remember when -- I don't remember it was this  
6 courtroom, I don't believe it was. It was an omnibus hearing  
7 where I appeared and Mr. Scott Baena wasn't present because it  
8 was a non-event, omnibus hearing. Mr. -- counsel for Grace  
9 stood up and announced that they had filed proofs of claim on  
10 behalf of my client, and we were going to have a science trial.  
11 And I stood up and said they can have their science trial, but  
12 my client cannot appear, and for that reason, will not appear,  
13 because he is powerless if he is only an individual. He cannot  
14 -- he could not find counsel, he could not pay for counsel to  
15 be here, and that's why we -- we went into -- as special  
16 counsel.

17                   Well, now as Elizabeth called us, we're -- we're non-  
18 special counsel. The science trial is in a hiatus, at the very  
19 least. And this -- this motion isn't a science trial motion.

20                   We are in the exact same position. If -- if the  
21 authority of my client to file a unified claim on behalf of  
22 that class is not recognized, then I don't have a client in  
23 bankruptcy.

24                   I am stayed in the Superior Court, prevented from  
25 bringing it in Bankruptcy Court. And then told by Grace

1 certainly post confirmation, I can't bring it then either  
2 because it's either barred, or too late, or something or other.  
3 It means the courthouse door was never, never opened. I have  
4 difficulty even imagining how -- and I can tell you this, too.  
5 Mr. Barbanti, in assuming the -- the duties of a representative  
6 has a duty to place the interests of that class above his own  
7 financial interest. That means if -- he isn't filing an  
8 individual proof of claim to try to get some individual  
9 monetary at law compensation for himself and abandon the class.  
10 His obligation is to represent, for better or worse, for  
11 victory or defeat, that class. And his -- his only relief, if  
12 this motion is denied, is before some other court. And the  
13 only court I know of that I can appear before would be some  
14 other court.

15 So, this motion is a modest one, it only asks that  
16 the courthouse door be opened and that an existing creditor,  
17 the In Re: Trebled (phonetic) case, another bankruptcy case  
18 said a pre-certified class is a single creditor, a single  
19 existing creditor.

20 I only ask that the courthouse door be opened for  
21 that creditor. And -- and Grace can subject that creditor's  
22 claim to whatever arguments it can imagine, and we have  
23 confidence we can demonstrate to this Court it's meritorious.  
24 And we will be able to demonstrate to the Court that the class  
25 device, not only isn't a burden to this Court, it is -- it is

1 virtuous.

2           But those are not the issues before the Court, only  
3 that the courthouse door not be closed. And with that in mind,  
4 I turn the lectern over to Elizabeth Cabraser, I still we have  
5 another 15, 20 minutes of time.

6           Thank you.

7           THE COURT: Ms. Cabraser?

8           MS. CABRASER: Thank you, Your Honor. Thank you,  
9 Your Honor, and thank you for hearing us this morning and for  
10 your patience throughout these proceedings.

11           The Barbanti Washington State class was a certified  
12 class at the time of the Grace bankruptcy. At the time of that  
13 bankruptcy, there was a proposed nationwide class moving toward  
14 certification in the District of Massachusetts under Federal  
15 Judge Saris who was assigned the task as serving as MDL  
16 transferee court for the litigation called In Re: Zonolite  
17 Attic Insulation, MDL 1376.

18           My role at that time was as a member of the court-  
19 appointed executive committee charged with moving through the  
20 briefing and hearing process on a nationwide class  
21 certification. We got through the briefing process. Judge  
22 Saris had set the class certification hearing for April 25th,  
23 2001. And the Grace bankruptcy was filed earlier that month.

24           Class proceedings have been in hiatus ever since.  
25 You know, Your Honor, that the Zonolite claims are inherently

1 class claims. You don't have individual claimants before you  
2 at this time. And as Mr. Westbrook and Mr. Scott have  
3 explained and advocated at every opportunity throughout these  
4 proceedings, these are inherently collective claims for  
5 equitable and injunctive relief. And you have heard the mantra  
6 of notification, education and remediation over and over and  
7 over again without variance. That is what these claims are.

8 You have before you today a creditor, a certified  
9 class with a designated agent -- two designated agents; Mr.  
10 Barbanti and Mr. Bush, who have, likewise, been present  
11 throughout these proceedings.

12 So, you have agents, you have class representatives,  
13 you have class counsel who have been designated, who have been  
14 charged as fiduciaries by a court to represent this collective  
15 claim, at least insofar as it has been certified for the  
16 homeowners and residence of Washington State.

17 This existence of a fully and adequately represented  
18 constituency solves the problem and provides what would  
19 otherwise be a missing piece of the puzzle to enable Grace to  
20 reorganize itself and to obtain that fresh start, which is the  
21 purpose of these bankruptcy proceedings.

22 We're not here today seeking class certification of a  
23 nationwide class. And we're not asking Your Honor to revisit  
24 at this time the previous class certification order in  
25 Washington.

1           Your question is a fair one. If that is the case,  
2 and it is today, what is the ultimate purpose of allowing this  
3 proof of claim as a class claim? What good does it do to these  
4 proceedings? Does it provide a mechanism that is better, more  
5 practical, more fair than any other mechanism that might exist  
6 to enable this reorganization to proceed, either through a  
7 consensual plan or through adjudication through further  
8 litigation.

9           Last month Your Honor raised the suggestion of a  
10 524(g) trustee. Typically 524(g) has been utilized in asbestos  
11 bankruptcies, as everyone in this courtroom knows far better  
12 than I, to deal with personal injury claims as futures claims  
13 become manifest. And it provides a channel for those claims so  
14 that the debtor can reorganize, can have that fresh start free  
15 of fear of future litigation outside that predesignated  
16 channel. That enables shareholders to have confidence in the  
17 new entity, it enables the public to have confidence in the new  
18 entity, and it assures that multiple courts across the country  
19 will not be involved for years and years and years with claims  
20 that could have and should have been resolved in a proceeding  
21 like this one.

22           That model has not been used, however, to address  
23 claims like the ZAI claims; that's not a surprise. These  
24 claims are highly unusual, and perhaps they are unique. We  
25 have a confluence in this case, as Your Honor knows, of a

1 produce from one source, it was a branded product, it was  
2 distributed nationwide. It was used, not by businesses, or  
3 sophisticated claimants, but in homes. And most of those homes  
4 harbor Zonolite insulation that is unknown to their owners.

5 As time progresses, the problem will become manifest  
6 and homeowners will have to deal with it, regardless of the  
7 level or degree of danger or risk of the product itself in  
8 causing personal injury, the presence of that product in homes  
9 when homeowners remodel, when they try to rent their homes,  
10 when they try to sell their homes is going to impact the value  
11 of those homes, is going to cost those homeowners money, and as  
12 we all know today, it's homeowners who are bearing the brunt of  
13 economic hard times. These are small claims, they don't  
14 attract lawyers on an individual basis.

15 When a personal injury claim for mesothelioma, for  
16 example, becomes manifest at some point in the future, the  
17 reason that a 524(g) trust mechanism works so well in  
18 addressing that claim and assuring it can be resolved without  
19 implicating the judicial process outside the Bankruptcy Courts  
20 is that that claim has value. It has value to a lawyer, it's a  
21 known type of claim, the courts have experience and trustees  
22 have experience in resolving that claim. There isn't prior  
23 experience in a 524(g) context --

24 THE COURT: There wasn't -- there wasn't trier  
25 experience in resolving asbestosis claims or, you know,

1 unimpaired claims in 524(g) trusts before they were set up  
2 either. I mean that's the same -- that's the same thing you  
3 hear about cases being filed in the District of Delaware, "oh,  
4 gee, the judges have experience." Well, of course, they do  
5 because cases are filed in the District in Delaware. If they  
6 were filed in the District of Iowa, Iowa judges would have  
7 experience, too. I mean that's a loop upon which, depending on  
8 where you start, that's where you get off.

9 The fact that you don't have experience trying the  
10 ZAI case in a 524(g) trust environment is an absolute  
11 irrelevancy. It hasn't been used in that context. The  
12 experience will come if the 524(g) process is used for that  
13 purpose. I mean you can't have the experience until the  
14 circumstances warrant the experience being used.

15 MS. CABRASER: We agree, Your Honor.

16 THE COURT: Okay.

17 MS. CABRASER: And it's -- every job applicant hears  
18 you can't have the job until you've had experience with the  
19 job.

20 (Laughter)

21 THE COURT: Exactly.

22 MS. CABRASER: And -- and we sympathize. And -- and  
23 there's also the "there's always a first time," and there was a  
24 first time for 524(g) trust, as well.

25 So, the real question is given that reality, is a

1 524(g) trust alone the best -- we -- we can predict, right,  
2 what will be the best and most appropriate mechanism for a  
3 given set of circumstances. And 524(g) has proved itself  
4 during the past 14 years in addressing future personal injury  
5 claims.

6 Is it as effective in addressing these collective ZAI  
7 claims? And we would respectfully submit, Your Honor, that  
8 authorizing and recognizing the Barbanti proof of claim today  
9 enables us all to embark on an orderly systematic process of  
10 determining just that question. We believe, and we are  
11 prepared to demonstrate in due course, that indeed a 524(g)  
12 trust process is an appropriate process to use to address these  
13 claims, but not alone; it needs a complement. There is a  
14 missing piece of the puzzle that dedicated specific loyal  
15 representation of the ZAI constituency supply. Because trusts  
16 don't run themselves. Trustees are fiduciaries. Trusts are  
17 given a source of funding, they're given a process, and they  
18 implement that process and they depend on claims coming  
19 forward.

20 In the case of a personal injury claim, that claim  
21 will come forward. Why? It's a valuable claim. Lawyers know  
22 how to prosecute that claim. They know the resolution values,  
23 it's a known predictable entity. It's become a systematic  
24 process. It's not just that this is as first time for ZAI. It  
25 is that the very nature of the claim is, number one, a claim

1 that sounds in programmatic collective relief. How would a ZAI  
2 claim come before a 524(g) trustee? Through a class  
3 representative, such as Mr. Barbanti. So, the Barbanti class  
4 is a part of that process. It's not contradictory, it's not  
5 inconsistent.

6 It enables the process to work as it was designed by  
7 the Bankruptcy Code to work. The trustee cannot go out and be  
8 an advocate to bring those claims in. That might even -- that  
9 might even constitute a conflict of interest. Certainly that's  
10 a new role that no 524 trustee has ever had, to our knowledge.  
11 And that would be new territory.

12 7023 of the Bankruptcy Rules is not new territory.  
13 Class proofs of claim are not new territory. Class  
14 certification of equitable claims, programmatic claims, such as  
15 this, are not new territory. The courts have vast experience  
16 with them.

17 The other aspect of these claims that you've heard  
18 about this morning is that the monetary portion of these  
19 claims, when a homeowner realizes that there's Zonolite in the  
20 attic and has to disclose it, and has to deal with it, and  
21 wants to remodel or sell or lease a piece of property, that  
22 manifestation costs money. It's real money to a homeowner. In  
23 the case of Mr. Bush, it was more money to remediate than his  
24 equity in his property. In the case of Mr. Barbanti, the need  
25 to remediate one of his properties complicated and delayed and

1 diminished the sale value and the lease value of that property.  
2 It's real impact on homeowners. But it's not the level of  
3 cost, it's not the magnitude of claim that most lawyers in this  
4 country are equipped to deal with on an individual basis, it's  
5 not feasible. It costs more to bring, even in a Bankruptcy  
6 Court with expedited proceedings, even through a trust  
7 mechanism than it is worth.

8 All right. Let's have -- let's ask lawyers to  
9 aggregate those claims one after the other after the other.

10 THE COURT: But where I'm losing this still is this,  
11 I have a class proof of claim for the State of Washington, and  
12 let's assume that I have a class proof of claim for homes in  
13 the State of Washington, that still leaves me with 49 other  
14 states. Now, that may not be the case that ZAI was sold in all  
15 49 other states, but let me just, for purposes of this  
16 discussion, assume for the moment that it is. I still have 49  
17 other states, and several countries, without representation.  
18 So, I have one class proof of claim that comes forward. That  
19 may solve, from your perspective as counsel for that class, the  
20 problems for the homeowners in the State of Washington.

21 It doesn't, as I see it, solve the problems that  
22 you're arguing would be solved for the debtor. Because all it  
23 does is solves the problems for the debtor with respect to the  
24 homes in the State of Washington, but the debtor still has the  
25 homes to address in the other 49 states, and wherever the other

1 countries are in which ZAI appears in homes.

2 MS. CABRASER: Indeed, Your Honor. Barbanti does not  
3 complete the solution. Barbanti enables the Court to embark on  
4 the solution in an orderly way to see, for example, if the  
5 Barbanti class, a discrete, previously certified Washington  
6 State class, works in terms of addressing the merit of the  
7 claims, the estimation of the claims. It is, in effect, a  
8 bellwether. And one thing that the federal courts is use  
9 bellwethers, they use exemplars to determine if, indeed, a  
10 particular structure, a particular procedure, particular  
11 counsel, particular claims work.

12 If the Court sees that the Barbanti class is a  
13 constructive part of an overall plan, or an overall  
14 adjudication of the bankruptcy, the next step, which is not  
15 before Your Honor this morning, would be to consider the  
16 expansion of the Barbanti class to include the states in which  
17 Zonolite was distributed and in which it is in homes or to  
18 certify a counterpart class for those remaining states.

19 You are way ahead of the game vis-a-vis other courts  
20 who might similarly be considering the expansion of a state  
21 right class into a nationwide class, or the addition of  
22 additional states. Because one thing you have, Your Honor, and  
23 one thing that is quintessentially important to the bankruptcy  
24 reorganization process is you have dedicated representation of  
25 that constituency. Mr. Scott and Mr. Westbrook have been here

1 from the beginning, they have pressed these claims from the  
2 beginning. The same claims asserted in Barbanti in Washington  
3 State were asserted on a nationwide level in the cases that  
4 were part of the Zonolite MDL, to which I referred. Those  
5 claims don't vary, it's the same claims, it's the same counsel,  
6 it's the same type of homeowner experience.

7 So, you can extrapolate with confidence from the  
8 Barbanti class as it works through its claims to the remaining  
9 states. But you have the problem in front of you today, and  
10 you've had the problem in front of you since the inception of  
11 the bankruptcy proceedings. It's not just a Washington State  
12 class, previously certified or not. The nationwide class has  
13 been waiting in the wings, the nationwide class is a -- is a  
14 creditor or potential creditor. And the claims by members of  
15 those classes, now or in the future, complicate and prevent  
16 Grace from achieving the comprehensive fresh start it wants and  
17 would not allow this Court, with confidence, to say W.R. Grace  
18 is reorganized, the claims are discharged, we have channels, we  
19 have processes for every type of claim. You'll have a channel  
20 and a process for the P.I. claims, present and future. You  
21 have a channel and a process, an agreed sum for the traditional  
22 property damage claims. This proceeding needs a channel and a  
23 process for the ZAI claims. 524(g) can be a vital part of that  
24 process in terms of implementing and paying out claims and  
25 funding programmatic relief.

1           But the creditors -- the creditor -- the creditor  
2 class needs an advocate, it needs representation. And this  
3 Court is in the uniquely informed position to determine after  
4 Mr. Scott and Mr. Westbrook, on behalf of Mr. Barbanti and  
5 Bush, further demonstrate their dedication, their bona fides,  
6 their experience, their adequacy in representing that class,  
7 whether a larger class will be similarly represented, either by  
8 them or by additional representatives. You don't have to  
9 decide that in a vacuum, it's not a matter of theory, it's been  
10 a matter of practice before you for the past seven years.

11           THE COURT: All right. And why is it that the  
12 Property Damage Committee itself is not appropriately  
13 structured to represent the ZAI claims, without the need for a  
14 -- for a class proof of claim or a -- or a class, whichever it  
15 is? I mean today you're only arguing a class proof of claim --

16           MS. CABRASER: That's correct.

17           THE COURT: -- but without that need.

18           MS. CABRASER: And that's -- that's another very  
19 excellent and profound question, and the answer is that a  
20 committee of that type is necessary, it has been functioning,  
21 it has been functioning well, but not necessarily sufficient to  
22 represent that type of claim, given it's inherently collective  
23 nature and given the very small values of the monetary claims  
24 of its constituent members.

25           THE COURT: But that's what committees do. I mean

1 trade committees, for the most part, in most cases, represent  
2 lots of very small claims, that's their whole purpose. Most  
3 trade creditors involved in cases have very small claims, given  
4 the size of the claims pool altogether. That's what trade  
5 committees do.

6 I don't mean trade committees consisting of  
7 bondholders and bank claims, I mean real trade committees.  
8 Suppliers, you know, contractors, whatever you have, they're  
9 very small claims, that's what committees are set up to do.  
10 That's why we have committees.

11 So, why is it that a Property Damage Committee, which  
12 is, by its very nature, a collective process, that's why you  
13 have a committee, so that you can collectively aggregate the  
14 small claims. So, why is it that in this case when Mr.  
15 Barbanti is already a member of that committee particularly,  
16 and was appointed as a class representative, why is it that the  
17 committee itself is not already set up to take cognizance of  
18 the ZAI claims and do the bargaining with the debtor that needs  
19 to be done to do exactly what you're suggesting? And I'm not  
20 making findings, I'm asking questions.

21 MS. CABRASER: Um-hum.

22 THE COURT: To -- to have a place at the table for  
23 the ZAI claims.

24 MS. CABRASER: The committee structure works well in  
25 bankruptcy for small -- claims, large and small that are known

1 claims, such as trade claims.

2 You're right, Your Honor, most of those claims or  
3 many of those claims, are small claims. But they're existing  
4 claims, for the most part, that are liquidated damages claim,  
5 and because those claims are known, they can be added up. A  
6 committee structure does the job, and does the complete job.

7 Here, the committee structure for property damage  
8 claims from the outset has been not quite an exact fit with  
9 Zonolite. It has certainly protected the interest, insofar as  
10 it is able, of Zonolite claimants and those Zonolite claimants'  
11 representatives on that committee. But a committee alone is  
12 not the best structure that is available under the Federal  
13 Rules and under the Bankruptcy Rules to deal with claims that  
14 have the unknown and unknowing aspect of these claims that are  
15 both futures claims and small claims, and that require ongoing  
16 programmatic advocacy and relief through repeated notification  
17 and education over time so that people can learn of their  
18 claims, learn what to do to mitigate their damages and harm,  
19 and learn where to go to achieve the available relief, if  
20 relief for this claim -- for this category of claim is  
21 available through a plan of reorganization.

22 Trade creditors don't need most of those steps. What  
23 they need is a committee to achieve economies of scale for them  
24 once they've put in their proofs of claim to get those claims  
25 resolved and paid out. The members of the ZAI class need more

1 than traditional large value, sophisticated property claimants,  
2 and they need more than personal injury claimants, past and  
3 future, which is why the class component of an overall  
4 structure works best under these circumstances. It's not a  
5 novel structure, it has been utilized before. There is a rich  
6 body of jurisprudence that governs it in both the Federal and  
7 Bankruptcy Court and State Courts. And the United States  
8 Supreme Court, which has mentioned 524(g) trusts only in  
9 passing in one case, has had occasion to visit and revisit the  
10 due process aspects of class actions and has set forth  
11 controlling rules that govern us all, court, class  
12 representatives and class counsel. And the promise that the  
13 Supreme Court gives all of us is that if due process is  
14 achieved through adequate representation of class members in  
15 the context of a class action, the determinations of the court  
16 regarding that class are final for all time, and for all people  
17 within the defined class, the debtor is relieved of all future  
18 responsibility to the claims of that defined group for all  
19 time. One court, not many, is charged with any of the ongoing  
20 jurisdictional and implementational aspects of the class  
21 decree, or the plan of reorganization, and judicial economy and  
22 fairness both to the debtor and an inchoate at this point, but  
23 yet impacted and to be impacted, class of creditor.

24                   Committees work well in bankruptcy for most of the  
25 routine claims that come into bankruptcy. But every so often,

1 Your Honor, there is a claim that is so inherently collective  
2 in nature, that is equitable in nature, that compromises the  
3 perfect storm of small damages, unknown and unknowing  
4 claimants, the missing and remedial recovery that the class  
5 structure is the best structure under the circumstances.

6 We advocate this as has been done for the past seven  
7 years because we believe it is the most practical, most  
8 workable, best established complement to the committee  
9 structure and to the utilization of other known devices, such  
10 as 524(g). And we would like the opportunity, not just to  
11 argue this, but to demonstrate this to Your Honor in an orderly  
12 and expedited way, to hasten the complete and successful  
13 reorganization of the bankruptcy and a structure of meaningful  
14 relief for the class.

15 Thank you.

16 THE COURT: All right. Thank you.

17 MR. SCOTT: If I might also add, Your Honor, a  
18 committee cannot file proof of claim. A committee cannot  
19 defend the proof of claim. And the Court will remember that  
20 this Committee quickly backed away from any representation of  
21 Zonolite when the science trial was teed up, disavowed because  
22 of inherent conflicts, engagement. And it required different  
23 counsel.

24 MR. BERNICK: Give me just a moment, Your Honor.

25 THE COURT: Actually, Mr. Bernick, while you're

1 getting ready, I think my staff, who's -- which has been here  
2 since 8:30, probably could use a five-minute --

3 MR. BERNICK: Oh.

4 THE COURT: -- break anyway. So, why don't we just  
5 take a --

6 MR. BERNICK: Thank you.

7 THE COURT: -- five-minute stretch break for  
8 everyone.

9 MR. BERNICK: Thank you.

10 THE COURT: Okay.

11 (Recess 10:34 A.M./Reconvene 10:48 A.M.)

12 THE COURT: Please be seated. Mr. Bernick?

13 MR. BERNICK: Thank you, Your Honor. Your Honor, I'd  
14 like to begin and talk about the rules that are applicable to  
15 the matters that are before the Court this morning. We're here  
16 on a matter that is governed exclusively by federal law,  
17 federal procedural law as set forth in the Code, federal  
18 bankruptcy practice as set forth in the Code. There is no  
19 issue of state law for the Court to resolve. There's no issue  
20 of state law that's properly before this Court.

21 And I want to talk about the rules and how they work  
22 with respect to the matters that are before the Court in how  
23 novel it is -- how novel the approach is that's being advocated  
24 by the ZAI claimants' counsel for just a moment here.

25 (MR. BERNICK IS NOT SPEAKING AT A MICROPHONE)

1                   MR. BERNICK: And with the Court's indulgence, I'm  
2 going to come up to the easel here and talk about the structure  
3 of Rule 9014. 9014 is the operative rule. And 9014 of the  
4 Bankruptcy Code spells out what is to take place with respect  
5 to applications Part 7 rules, as Your Honor is well familiar.  
6 Part 7 rules deal with various procedural matters, including  
7 Rule 23.

8                   Part 7 does not specifically call out the application  
9 of Rule 23, except with respect to adversary proceedings. This  
10 is not an adversary proceeding. The adversary complaint was  
11 originally filed in '01 or '02, it was withdrawn and I think  
12 ultimately dismissed. This is a contested matter that's  
13 brought under Rule 9014.

14                  With respect the Part 7 rules, the Part 7 rules spell  
15 out -- and I don't -- or sits -- sets out certain particular  
16 rules that shall apply, and then says with respect to the other  
17 rules that are part of Part 7, they may be applied. So, the  
18 operative rule here or the operative language is a "may"  
19 language, says "the court may apply the rule." And the rule  
20 that's at issue here is Rule 7023, which, by its current terms  
21 under Rule -- under Part 7 is confined to adversary  
22 proceedings. But this 9014 creates a plenary power, a  
23 discretionary power to go ahead and apply that rule under  
24 circumstances as dictated by the court's discretion.

25                  So, we have a pretty simple equation here. It's an

1 equation that says 9014 -- under 9014, the court may apply  
2 7023, which is a class action rule as a federal rule of civil  
3 procedure 23.

4 We also know from the decisions which have  
5 interpreted the language of 9014, that the "may" decision, that  
6 made as whether 7023 shall be applied, or may be applied,  
7 focuses on the unique characteristics of bankruptcy, that's in  
8 the context for which a class action rule is invoked.

9 So, we have a decision -- a question of should it be  
10 applicable, does it apply, with a question mark? And if it  
11 does apply, compliance? Is there compliance with Rule 23? And  
12 both decisions have to be taken. The decision about whether to  
13 apply is different from the decision about is there compliance  
14 with the rule. And that's significant because may apply under  
15 9014 is simply a question of the rule that is class action rule  
16 should be brought to bear in the case. There's a separate  
17 decision that has to be made with respect to compliance.

18 9014 doesn't say the court may in its discretion  
19 certify a class; that's not what it says. It says the court  
20 may, at any stage, direct that a -- other part of Part 7 shall  
21 apply, that's the discretion decision.

22 There's nothing about this rule that simply displaces  
23 the substantive requirements of Rule 23. That is a separate  
24 analysis. So, this is not a case where somehow there's  
25 different class action procedure in bankruptcy because of the

1 "may" language in 9014. There is a threshold consideration in  
2 bankruptcy under 9014 as to whether Rule 23 applies, and then  
3 you got to follow Rule 23. So, it is a two-prong test.

4 Now, the reason I do all this, the reason I put the  
5 box around it is that there are some things that are not in  
6 this picture, that are not in Rule 9014, and are not in Rule  
7 7023. One thing that is not in this picture is state class  
8 action law.

9 Another thing that's not in this picture are the  
10 state courts. Another thing that's not in this picture is Rule  
11 3001, which deals with the filing of the claim, that's not in  
12 this picture. And it is certainly nowhere in this picture,  
13 because 3001 is not here, because somehow 3001 can be used to  
14 trump any part of this process, that's nowhere to be found.  
15 That's, indeed, contrary to the language that's set forth in  
16 Rule 9014.

17 So, the argument that says somehow the court should  
18 be looking to state procedural law is a false argument. The  
19 argument that somehow there's such a thing as a motion for  
20 recognition under Rule 3001 that Mr. Scott says we want the  
21 Court to recognize a agency, there is -- there is no such  
22 motion. And there's certainly no such motion that displaces  
23 what 9014 says, which is the court needs to exercise its  
24 discretion and in applying Part 7, which has substantive  
25 requirements.

1           The whole idea for a motion brought pursuant to 3001  
2 is simply false, and an abrogation of the Code.

3           The notion that somehow this Court can simply defer  
4 to, and not pass on the merits of Rule 7023 because that matter  
5 has been determined by a state court under state law is nowhere  
6 to be found in contrary to the Code. That would be the Court  
7 basically relinquished -- not relinquishing but failing to  
8 exercise its power to actually do what 9014 says, which is  
9 decide whether to apply, apply Rule 23. Rule 23 requires an  
10 affirmative decision.

11           Now, in a service of the idea that all of this  
12 landscaping was playing under the rule, and in every single  
13 circuit this has addressed this, which is it's a two-prong  
14 test, every Circuit Court that's adopted the idea of class  
15 actions in bankruptcy have recognized this two-part  
16 requirement, including originally American Reserve out of the  
17 7th Circuit. And in service of saying that all of that is  
18 wrong, there are two cases that are cited, and only two cases  
19 that are cited.

20           One case that's decided is the Trebled (phonetic)  
21 case. I'm going to put the Trebled case in black because it  
22 does fall within this group, it doesn't stand for the  
23 proposition for which it is urged. In Trebled, there was a  
24 prior class certification by a federal court under federal  
25 procedural rules, resulting in a final judgment. And under

1 those circumstances, the Trebled court properly found, or  
2 certainly exercised its discretion under Rule 9014, and said,  
3 you know what, it's a federal -- a prior federal certification,  
4 and a final judgment, it's collateral estoppel. It's not that  
5 you are failing to apply the requirements of Rule 23, it's that  
6 they have already been finally determined by a court of  
7 competent jurisdiction, a federal court applying the right law,  
8 that's entirely consistent with the picture that I think that  
9 9014 sets out, entirely inconsistent with what it is that we  
10 have here.

11 The other decision that I'll put in red is the Kraft  
12 decision. Because Kraft lies outside of this rubric. Kraft is  
13 a District Court case. And Kraft is three things, none of  
14 which are consistent with the Rule, and none of which have been  
15 adopted by any court elsewhere.

16 First of all, Kraft conflated the 9014 analysis about  
17 whether to apply Rule 23 with the substantive Rule 23 analysis,  
18 and it specifically says, "I've asked what we're doing." It  
19 says, "Basically we think that this is all discretionary." And  
20 in doing so, the Kraft court disregarded the express  
21 instruction of 9014, which deals with the application of rules.  
22 The court basically said, I'm not going to apply the rules, I'm  
23 going to exercise my discretion and simply decide that the  
24 prior certification was good enough.

25 Number two, as set forth in Footnote 14, the

1 Kraft recognized that it was out of step with other courts,  
2 which is a mild statement.

3                   And the third thing that Kraft is significant for is  
4 that at least in the Kraft case, the prior certification was  
5 made by a federal court under federal law, applying the Federal  
6 Rules of Civil Procedure. Here, what the plaintiffs argue for  
7 is not Kraft, it's not Trebled, it is something completely  
8 different, completely novel and completely wrong, which is that  
9 somehow you can apply -- have a federal court arrogate its  
10 decision-making power and responsibility under the Federal  
11 Rules of Bankruptcy Rules to a state court, applying state law  
12 and then say, well, it's all okay because we're simply finding  
13 -- asking Your Honor to find that there is recognition of the  
14 agency relationship between the class representatives and the  
15 class, go to Rule 3001. And, therefore, they're so careful to  
16 say, oh, we're not asking you to revisit -- we're not asking  
17 you to revisit the Rule 23 requirements and certifications,  
18 we're not asking you to do that. We're not asking you, indeed,  
19 to exercise your discretion. What they're saying is, you know  
20 what, this is really good, this is a good way of solving this  
21 bankruptcy case and all you got to do is recognize that agency  
22 relationship. That's not Kraft, that's not Trebled, and that's  
23 certainly not the law of every single Circuit that's recognized  
24 class actions, and that's not Rule 9014. It's just plain  
25 wrong. Very clever, but wrong.

1           Now, the significance that that has with respect to  
2 the impact of their approach on actual rights that are  
3 important rights is palpable. And I want to go through the  
4 analysis -- what is the two-prong analysis, and I'll try to be  
5 quick about it under each of these prongs, and get to, I think,  
6 the same questions that Your Honor posed and other counsel for  
7 the ZAI folks addressed here this morning.

8           It's tempting in this context because it's logically  
9 coherent, it made sense. And to begin with the "may" question  
10 is should the court, may the court apply, should the court  
11 apply Rule 7023? Do that first before you get to the actual  
12 application of the Rule.

13           And I'm going to violate the -- that logical order  
14 because the fact of the matter is that we're dealing with what  
15 can only be fairly described as the dead cat in the room. And  
16 the dead cat in the room is that what they're asking the Court  
17 to do with a (b)(2) certification is squarely contrary to  
18 settled 3rd Circuit law.

19           They're asking the Court to certify a (b)(2) non-opt  
20 out class. And to do so would directly contravene the 3rd  
21 Circuit's decision in the Asbestos School litigation in 1986.  
22 It would also contravene the law of all the other circuits that  
23 have decided this matter, which is you can't simply invoke  
24 (b)(2) and eliminate people's opt-out rights by reframing as  
25 equitable relief under (b)(2) what is actually compensatory or

1 || damages relief.

2                   And in the Asbestos Schools case, there was -- that  
3 was a remediation case. Mr. Westbrook was present in this  
4 case, and I know that it was not as ably argued by Arthur  
5 Miller because Ed didn't have a chance to take his feet.

6 MR. WESTBROOK: But we won.

7 (Laughter)

8                   MR. BERNICK: That's right. He won, we'll get to the  
9 (b)(3) thing here in a minute.

10                   But what happened in Asbestos Schools is, again, is  
11 asbestos property damage remediation case, and the 3rd Circuit  
12 had this to say, says, "District Court concluded that despite  
13 the plaintiffs' ingenuity, the claims in this suit were  
14 essentially for damages and an action -- money for -- action  
15 for money damage may not be maintained as a Rule 23(b)(2) class  
16 action." That's what the 3rd Circuit said.

17 Now, this case is no different. Indeed, in this  
18 case, the particular brand of equity that -- on which the ZAI  
19 claimants' counsel seek to visit upon their clients, the  
20 particular brand of ingenuity is particularly -- is  
21 particularly problematic. And I'm going to play, you know,  
22 kind of Wheel of Fortune here. What if you had an ordinary  
23 claimant? I'm sorry not -- I -- I can just move it over here.

1                   MR. BERNICK: That's okay. I'll move -- I'll move  
2 this.

3                   THE COURT: All right. Thank you.

4                   MR. BERNICK: Is that okay?

5                   THE COURT: That's fine.

6                   MR. BERNICK: An ordinary claimant who is being  
7 accorded due process rights will get a neutral notice, must be  
8 neutral under Supreme Court law, will then have the opportunity  
9 to make a decision whether to file, what to do, if that person  
10 decides to file a claim, they'll file a claim. They'll then  
11 have the opportunity to prove liability. And if they're  
12 successful in proving liability, they can collect damages.  
13 That's not a function of the class action rules, that's a  
14 function of due process of law. And those are requirements  
15 that can't be abrogated consistent with due process.

16                  If we take a look at what it is that will be  
17 accomplished under the circumstances that are being advocated  
18 here, what happens? Well, the neutral notice is out. Under  
19 (b)(2), there is no neutral notice. Indeed, that counsel  
20 insisted neutral notice is not a requirement.

21                  Instead, it is replaced with warnings and education,  
22 that's one huge prong of what they want. They want to warn and  
23 educate. They don't want to give neutral notice.

24                  What happens to the opportunity to make a decision?  
25 That's out. There's no decision to be made because there's no

1 opt out. That's gone under (b)(2), it's a mandatory class.

2 What happens with respect to the ability to recover  
3 dollars? That's gone, too. There's no independent or separate  
4 ability claim for damages. You have to claim out of a fund,  
5 that's where your recourse is. Because they want to make --  
6 they want to transform compensation on an individual basis with  
7 taking from a fund that's administered in its own fashion.

8 But it doesn't stop here. I mean right now, you can  
9 see immediately that far from preserving the substantive rights  
10 and procedural due process rights of individual claimants in  
11 their effort to get into (b)(2), they're essentially  
12 constraining their own clients. But it gets worse.

13 In this particular case, if we go to the particular  
14 context that as we now take a look at what happens in the  
15 context of the bankruptcy environment, and this is now germane,  
16 we're now into the "may" world, how does the bankruptcy context  
17 affect these folks? Because all of what I've said to be true  
18 would be reason that you follow Asbestos Schools, and you do  
19 not apply (b)(2). These facts alone establish that it's not  
20 (b)(2) and, indeed, it's a very -- would be a hugely  
21 compromising application of (b)(2).

22 But if we now go to 9014 and "may," there are a whole  
23 series of additional factors. And the reason that's very  
24 important, I want to underscore here for a moment before I go  
25 on why it's so important to deal with the "may." There's been

1 a not so veiled indication that we're only at Step 1 in their  
2 ongoing quest. And the reason I say that is that they've been  
3 very careful to say, oh, well, we're not really asking the  
4 Court to address certification; we want recognition of the  
5 Washington class. And by the way, that national class, it's  
6 still out there. And we received a call indicating that no one  
7 was supposed to talk about anything else other than the  
8 Washington class here today. But they, themselves, have now  
9 made a reference to there being some kind of national class  
10 that's going to be brought.

11 And so while today I want to address 7023 with  
12 respect to (b)(2), and I think that the answer to that is  
13 Asbestos School -- that Asbestos Schools case and the  
14 particular way that their claim for equitable relief actually  
15 is a derogation of rights, and is a classic ingenious  
16 manipulation of pleadings to get into (b)(2), directly contrary  
17 to 3rd Circuit. I also want to get into 9014 in the "may"  
18 because I think that this Court needs to resolve the issue now  
19 about whether there should be any class here because I think  
20 that on the concern that if Washington doesn't work, then we'll  
21 be back again at another date even later in this process. And  
22 our essentially -- essential position is the class action  
23 doesn't sense no matter what the class is.

24 So, let's talk a little bit about 9014. In the  
25 context of this particular case, what does application of the

1 class rules and certification mean? Well, what about those  
2 people who actually are now compelled to participate in this  
3 class? Well, in the context of this case, they're being asked  
4 to participate in a class that already has -- where the  
5 representative has already had a very nature determination made  
6 in the science trial that there's a major defect, if not a  
7 dispositive defect, in their claim. Mr. Barbanti was one of  
8 the individuals whose claims was litigated in the context of  
9 the science trial.

10 So, now all these good folks that are going to be  
11 represented by Mr. Barbanti are now burdened by Mr. Barbanti's  
12 loss in connection with the science trial.

13 Now, of course, the Court will point out, well, Mr.  
14 Bernick, aren't you now going to argue -- aren't you, in fact,  
15 going to argue the science trial outcome should be binding on  
16 all those people who are claimants? The answer is, yes, we  
17 will, but this motion basically accomplishes the litigation of  
18 that issue in one stroke. In one stroke, they are now making  
19 every single one of the ZAI claimants on a non-opt out basis  
20 subject to Your Honor's determination from the science trial  
21 adverse to them.

22 So, far from having the ability to litigate liability  
23 without a new or at least subject to some kind of motion  
24 practice, these folks, on behalf of their clients, are  
25 compromising their clients' rights. Now, it may be that they

1 have some broader strategy, which is to try to overturn the  
2 science trial determination. But certainly people who aren't  
3 Mr. Barbanti ought to have at least the right to think about  
4 and maybe decide whether they would like to be with Mr.  
5 Barbanti now that Mr. Barbanti has lost in the science issue.

6 Then what about the people who actually respond to  
7 the bar date by saying, I want to file a claim? They've gotten  
8 the notice and they say, I want to have a claim. Well, the  
9 answer to those people is that they have no claim. They do not  
10 have the right on an non-opt out situation to actually have the  
11 claims they decide to file in response to the bar date  
12 litigated.

13 So, you see, this is just a wild, wild proposition.  
14 It gets worse. What about with respect -- and this is  
15 perfectly appropriate in the context of working with 9014, how  
16 does -- how does their effort affect the prospects for  
17 resolution? Well, actually let me reverse this a little bit  
18 and do it this way. There are some other factors before I get  
19 to resolution; resolution is down here.

20 There are plus factors that are unique to this case.  
21 What about futures? These people want to control them. You  
22 heard it. They have got their magical solution, their magical  
23 solution for how to prevent there ever being a futures problem  
24 in this case. They're going to put it all in the package and  
25 resolve them. Well, how do they represent those people? How

1 do they have the right to do that?

2           They claim that it's a benefit; it's an enormous  
3 problem for them. They're now not only saying that the people  
4 who are out there who they want to represent will be bound to  
5 their particular brand of justice, they're reaching out into  
6 the future so that everybody on a mandatory non-opt out basis  
7 is subject to that same determination, all under Rule 23(b)(2).

8           What about fairness? Fairness doesn't play much of a  
9 role in this process. The Washington people, they're burdened  
10 by the science trial outcome, they're non-opt out, they have to  
11 be satisfied with whatever they're told in the education or  
12 whatever comes out of the fund. Whereas everybody else will  
13 not be so constrained, they'll be able to exercise rights.

14 How's that fair? That's not fair.

15           Why is it that these folks here -- this is under the  
16 aegis of "we know how to educate these people" kind of the  
17 brand of paternalism. You get kind of totalitarianism. Which  
18 is we are going to do everything for you, you've got to play by  
19 our rules, our rules. That's not class action practice.

20           And then when it comes to resolution, and this is of  
21 the essence because, again, as they're waiting in the wings for  
22 something else to happen in this case, and they're going to  
23 have now a new class action, let's (indiscernible). They apply  
24 also to Washington, but they would apply to any class. The key  
25 fact equals who is a claimant? We can -- we can have all kinds

1 of speculation about how many people can -- will come forward.  
2 There will be surveys that they referred to, extrapolations,  
3 statistical stuff, we've been through that ad nauseam in the  
4 case, and it -- well, let me tell you, we go down this road,  
5 we're going to go through it until the cows come home. It will  
6 all be completely and utterly speculative because none of it  
7 addresses the key fact that must be determined which is who  
8 actually comes before the Court after getting due process  
9 notice and says, I've got a claim and I want to litigate it.  
10 There are many people who may decide that they either don't  
11 have claims, or they don't care about their claims. So, who  
12 actually shows up? (Indiscernible) bankruptcy process says,  
13 we count.

14 Well, we're going to get those with respect to people  
15 around the country. But this -- what this does with respect to  
16 that key fact is to say: doesn't matter, got to include  
17 everybody, everybody. How does that affect resolution when you  
18 now have injected into the process a certification always  
19 subject to interlocutory appeal because all class action  
20 certifications are now subject under the rules of interlocutory  
21 appeal. Or they say, oh, well, all we do is run the  
22 calculator, and we own the company. That's not a benefit to  
23 resolution.

24 What about the Amchem (phonetic) problem? Don't they  
25 now have an enormous conflict of interest with respect to

1 futures? With respect to non-D.C. people? They're purporting  
2 to represent the interest of the futures. Amchem says you  
3 can't do that. They're purporting to create a template for  
4 non-Washington people. Well, but non-Washington people are in  
5 a different situation than that Barbanti people. Don't you  
6 have conflicts? How do these people -- they all said this  
7 morning that they are representing the Barbanti class. Don't  
8 they have a conflict with respect to representing here or  
9 talking to the interest of anybody who's a futures? Of anybody  
10 who is outside of D.C. -- of Washington? Don't we have an  
11 enormous Amchem problem? Wasn't even talking about the future,  
12 wasn't even talking about folks outside of Washington.

13           And then finally when it comes to resolution, the  
14 elephant in the room is the deal. There's a -- there is a bird  
15 in hand kind out there that's been put together at great pains.  
16 And we now have folks that are prepared to say that -- as we  
17 know, it's delicately balanced, indeed, it recites that all of  
18 the -- there's -- one of the preconditions or conditions or  
19 parameters of the agreement in principle is that all ZAI claims  
20 will be subject to an estimation and they will be paid in full.

21           When are we going to know who the real claimants are?  
22 We are only going to know who they are, and we're only going to  
23 know what that estimate is if we actually have them come  
24 forward in response to the bar date, file their claims, and  
25 have a determination of whether their claims have value.

1           To the extent that we have any kind of class that's  
2 out there which purports to bring into this case an unknown  
3 number of people because they don't have to do anything in  
4 order to participate in the class, particularly if it's (b)(2).  
5 But to the extent that we have an unknown number of people who  
6 are out there and never expressed themselves, how in the world  
7 can you do an estimation of a value of their claims unless  
8 they're all zero? How can you do any kind of estimates as to  
9 this deal? There's huge uncertainty that will sweep over this  
10 deal.

11           Now, that, unfortunately, I think, is what they want.  
12 You have heard before when it came to -- the arguments about  
13 ZAI that counsel for the ZAI claimants stood up and said,  
14 indeed, they told Judge Buckwalter this, as well, when they  
15 asked for an interlocutory appeal of Your Honor's science  
16 determination. They said, a deal is going to be done in this  
17 case, it's going to be done soon. We want to be part of that  
18 deal. And what we need from you, Judge Buckwalter, is to  
19 review this thing because right now, our leverage is not so  
20 great, we want to improve our leverage.

21           So, sure, certification of the Washington Barbanti  
22 class is designed to create uncertainty. It's designed to  
23 create leverage. That is not designed to bring us forward to a  
24 deal, much as there are all kinds of, I'm sure, earnestly  
25 professed desires to get this case done and brought to a

1 conclusion. The best way of getting that is to find out who  
2 the ZAI claimants really are, do they have a claim so we can  
3 pay them. That is the shortest way to connect the dots.

4 In preserving under some (b)(2) construct the claims  
5 of people who do not come before the Court in connection with  
6 the bar date, and will never learn until they make a claim  
7 against the fund is the best way to ensure that there is no  
8 deal. And the law does not require that we create novel  
9 classes and recognize novel motions like recognition, and  
10 service of people who do not come forward by the bar date. The  
11 fact of the matter is that under the Bankruptcy Code, you give  
12 due process notice, people have got to file their claims. If  
13 they don't file their claims, they are not allowed, they don't  
14 get paid, they don't have to be estimated, they don't have to  
15 be part of the plan. That is the fact of the matter under the  
16 bankruptcy procedures.

17 So, for all those reason, Your Honor, we are at a  
18 very critical juncture. There was a lot of focus paid to class  
19 action, and class action is an option for a long time. Your  
20 Honor set the bar date, and counsel was very anxious to come  
21 forward and have the class issue determined. So, we set it all  
22 up, we got everybody here, the class issue is before the Court.  
23 Now is the time to decide really is it going to play a role  
24 that's productive, and is it even allowed under the rules? Not  
25 doing it piecemeal in steps, Washington versus national, it's

1 just let's get it done now and get on with business so we can  
2 get to the end of the road.

3                   One last thing I'll say is just to offer just a  
4 couple of comments with respect to these charts Mr. Westbrook  
5 showed you. He showed this chart here. This is the one with  
6 all of the lawsuits that have been class actions. What's very  
7 notable is that all of them were before Amchem and Ortiz  
8 (phonetic). Because -- there's a whole big trend where  
9 everything was trying to use class actions as the tool to  
10 produce resolution and settlement. And then Amchem and Ortiz  
11 came out and said there's such a thing called predominance, and  
12 there's such a thing of -- of what is representing too many  
13 people. And this was after a series of decisions that I know  
14 Your Honor is familiar with, swept the country in the mid-  
15 1990's. In the early 1990's and late 1980's, class action  
16 procedure was felt to be the best way of kind of managing  
17 disparate litigation. It turned out to be a way of creating  
18 disparate litigation. And by the mid-1990's virtually every  
19 single Circuit in the country had decided that you shouldn't be  
20 certifying classes that -- where there were truly individual  
21 issues and differences of law that were involved. That did go  
22 up to the Supreme Court, and so we've got a bunch of cases that  
23 were decided before, and these are all cases, including In Re:  
24 Asbestos Litigation, which was certified as a (b)(3) class,  
25 quote, "notwithstanding the Court's concern over

1 manageability." And that's what the 3rd Circuit said. And it  
2 was manageability that ultimately was the Achilles' heel of  
3 this whole use of class actions and the reason why you don't  
4 see any other class actions that are certified and affirmed on  
5 appeal in the late 1990's and since that time.

6 Indeed, even where you have commercial class actions  
7 where there are damage -- economic damage claims, they are not  
8 certified as nationwide classes because of variations in the  
9 law between the different states. So, these are all old cases.

10 Number two, they all involve a mature tort. These  
11 are cases where lots and lots of people have already come  
12 forward and presented claims for individual litigation and been  
13 successful. There had not been a single lawsuit in the entire  
14 country with respect to ZAI that's been successful, including  
15 the Barbanti case, which Your Honor is well familiar, resulted  
16 initially in a preliminary injunction hearing where the court  
17 said, you know what, I don't think this thing is so easy, I'm  
18 not sure that there really is risk.

19 So, we're sitting here today contemplating massive  
20 theoretical liability where there is no track record of there  
21 having been established liability in any case.

22 And finally, none of these cases are (b)(2) cases,  
23 which is what the Washington case is. There was a reference,  
24 Your Honor, to this chart here as a way of saying, well, the  
25 time has come finally to get to the people in their homes.

1 Everything else has been resolved, and Mr. Westbrook talked  
2 about all the money that's been spent. And with due respect to  
3 Mr. Westbrook, I don't think that the picture is really  
4 complete because a major player ain't there, which is the EPA.  
5 It is the EPA, that with respect to the Libby area, the homes  
6 and neighborhoods of Libby, spent the \$250 million -- or will  
7 be spending, they say, \$250 million, it was the EPA that said  
8 they had to be cleaned up. That was litigated, it was  
9 litigated as a cleanup matter under the EPA's special powers,  
10 that's why that occurred.

11 With respect to the vermiculate expansion plants --  
12 with respect to the mine, the EPA hasn't actually decided what  
13 to do, that's not an issue that's been resolved, but it's an  
14 issue that will -- will, in fact, be addressed in connection  
15 with a government directed remediation.

16 With respect to the vermiculate expansion plants, Mr.  
17 Westbrook tossed out a figure of \$44 million and said that that  
18 includes the vermiculate expansion plants. Well, it does, but  
19 it also includes a whole bunch of other environmental sites  
20 that got nothing to do with vermiculate or expansion plants at  
21 all. And in this instance, Grace agreed to remediate those  
22 sites, together with non -- non-vermiculate sites. So, it's  
23 not like somehow \$44 million got spent on the expansion plants,  
24 or that, indeed, the expansion plants are even that major a  
25 problem.

1                   What about the homes, the homes outside of Libby?  
2 Because the homes in Libby itself, there are many circumstances  
3 surrounding those homes, including what's in them. Because the  
4 homes in Libby, some of them have expanded product. But a lot  
5 of them have vermiculite concentrate, which is a very closely  
6 related, but different material. So, these are not commercial  
7 attic-filled insulation properties. They're part of the  
8 broader issue that the EPA felt affected Libby as a whole and,  
9 therefore, was included in the EPA's cleanup.

10                  But with respect to homes outside of Libby where  
11 commercial attic fill insulation has been used, the EPA  
12 specifically addressed whether there was some pressing need to  
13 take all that stuff out and said, no. No. So, when we get to  
14 the homes, not only do we have not a single claim that's ever  
15 been filed and found to be meritorious, you have the EPA itself  
16 who drove the costs of recovery elsewhere saying, we don't see  
17 a need to go into everybody's attic and take it out. That's  
18 what that chart says.

19                  Then we've got all these supposed benefits:  
20 efficiency, compensation, deterrence and justice.

21                  Well, efficiency. There's been a lot of discussion  
22 about efficiency. The Bankruptcy Code, after all, is designed  
23 to produce efficiency. It's got something called a bar date.  
24 And you can get all the common issues litigated, you can get  
25 common counsel, you can have streamline settlement discussions

1 and resolve a large number of claims, all completely without  
2 regard to class actions because of the unique properties of the  
3 Bankruptcy Code, which include having a bar date, that brings  
4 everybody into court, and rule -- having Rule 42, which does  
5 apply under the Code and says you can have a consolidated  
6 litigation even where the predominance requirements of Rule 23  
7 are not met. And this is a speech, I know -- I know that Your  
8 Honor has heard and, respectfully, counsel has heard from me  
9 far too often, but it still remains true today. You don't need  
10 a class to get those efficiencies.

11 Compensation. We agreed, we agreed to compensate Mr.  
12 Westbrook and Mr. Scott. Your Honor heard it last time, to act  
13 on behalf of this group of people. Well, it turns out that,  
14 for various reasons that I can't completely appreciate because  
15 they were announced to me, not by Mr. Westbrook, but by Mr.  
16 Baena somehow in an e-mail, that arrangement is not  
17 satisfactory, and they are not prepared to act as special  
18 counsel with respect to the ZAI claimants. I guess their  
19 decision is to act for counsel for the purported class.

20 So, we tried to make that arrangement; it didn't  
21 work. Maybe there's some other way that it can happen. We  
22 thought that that was the fastest way to go. And I guess today,  
23 the people who are going to be representing the common  
24 interests of those folks are people on the P.D. Committee. And  
25 I don't think that that's terribly attractive, not because of

1 efficacy considerations at all, but because of -- of the -- the  
2 smooth working of the process of dealing with and negotiation  
3 with the committee in this area, but that is where it stands.  
4 And until people file their claims, I suppose that they're  
5 going to have to be represented by the P.D. Committee.

6 Deterrence. Well, we've got teach a lesson to the  
7 debtor and set an example to others, that's very interesting  
8 with respect to a product that's never even been found to have  
9 liability associated with it. Indeed, Your Honor's  
10 determination suggests that there will be no liability with  
11 respect to it. So, somehow there's a lesson to the debtor that  
12 we need to be chastised for conduct that's not been found to be  
13 wrongful at this point?

14 And then justice. That justice is the only way --  
15 class action is the only way to get the justice. I thought  
16 that that's what the bankruptcy law did, as well. Indeed,  
17 given the problems with resolving mass torts, that it may well  
18 be that the better brand of justice is to be found in the  
19 Bankruptcy Courts.

20 So, for all those reasons, we think that the time has  
21 come for the Court to issue a decisive pronouncement with  
22 respect to this continuing effort. You saw that in the case of  
23 Anderson Memorial, it was like the issue that never died until  
24 finally we argued it all and we had another round of briefs and  
25 Your Honor issued an opinion. We think that the same thing is

1 necessary here and that we ought to really decide one way or  
2 another, is there going to be a class action given the  
3 constraints -- or given -- not the constraints, but given the  
4 guidance of Rule 9014 and the decisions that have been rendered  
5 in this area.

6 Thank you, Your Honor.

7 THE COURT: Mr. Westbrook?

8 MR. WESTBROOK: Your Honor, I'm -- respond to just  
9 one point on the special counsel situation, just so there is no  
10 misapprehension. The problem arose, Your Honor, because Grace  
11 insisted that if we were going to be special counsel for ZAI,  
12 the Property Damage Committee could have no further role, even  
13 on bankruptcy specific issues which are very technical and  
14 which we do not have expertise. And we said we could not agree  
15 to those constraints, that we would be speaking for ZAI on  
16 matters of complex bankruptcy matters. That's why it didn't go  
17 ahead.

18 MR. BERNICK: But, Your Honor, with due respect to  
19 Mr. Westbrook, the only statement, at least that I received, or  
20 anyone, I think, from my firm received as to why this was done  
21 was a one-line e-mail from Mr. Baena that basically said that  
22 given the terms of our proposed order, he didn't believe it was  
23 appropriate that there be this kind of role.

24 We never really found out exactly what it was. I  
25 personally had a conversation with Mr. Westbrook at the very

1 beginning, which was very cordial, very cooperative and I -- I  
2 believe I'm not accusing Mr. Westbrook of any kind of bad faith  
3 at all, I just don't know what the ultimate problem was. But  
4 certainly if the issue is whether the P.D. Committee or Mr.  
5 Baena can provide bankruptcy advice to the folks who are  
6 representing the ZAI claimants, I don't think we have a problem  
7 with that. The whole idea was that somebody should be standing  
8 up for them who didn't have the other dynamics of the committee  
9 to deal with because they're a special situation. Mr. Dies has  
10 settled all of his claims.

11 So, if the only issue is whether bankruptcy advice  
12 can be offered to Mr. Scott and Mr. Westbrook, I don't think  
13 there's any issue from us that that's okay.

14 MR. WESTBROOK: Your Honor, that was the provision  
15 that came back from Grace, and then Mr. Baena said it wasn't  
16 acceptable. Our position was if there's some complex  
17 bankruptcy issue that came up, Mr. Baena should be allowed to  
18 come up here and educate the Court on it if the Court could be  
19 helped, and we are not the people to take time from Mr. Baena  
20 to educate us and then we try to ventriloquist to the -- to the  
21 Court. We want Mr. Baena not to be disabled, and I think the  
22 e-mail from Grace said that the Property Damage Committee would  
23 have no further role, and we couldn't accept that.

24 MR. BERNICK: We -- we could --

25 THE COURT: Okay. Well, I don't -- I don't -- my

1 concept when this issue came up very quickly at a status  
2 conference was not that the Property Damage Committee was being  
3 disenfranchised, it was that the ZAI claimants were being  
4 enfranchised.

5 So, I think maybe there's just a little bit of  
6 miscommunication going on that you folks ought to -- if you  
7 were talking, rather than e-mailing, maybe you'd be able to  
8 work it out.

9 So, the order is you talk. It seems to me that maybe  
10 there's just some written problem. You know, sometimes things  
11 get put in writing that don't have quite the same inflection.  
12 And as a result, there's --

13 MR. WESTBROOK: That --

14 THE COURT: -- a misunderstanding.

15 MR. BERNICK: That's fine. Although to be clear, we  
16 do have concerns with Mr. Baena arguing the substantive  
17 positions as he has in the past on many of these things because  
18 we think that, frankly, he's conflicted. He's got a whole  
19 group of people who have settled their cases.

20 But be that as it may, if the issue is whether they  
21 can get bankruptcy advice from Mr. Baena, there's no -- that's  
22 not a -- that's not a problem.

23 THE COURT: Well, I think --

24 MR. BERNICK: So, we'll talk --

25 THE COURT: I think --

1 MR. BERNICK: We'll talk some more.

2 THE COURT: All right. I think the better way to  
3 handle that is if the debtor thinks there's a conflict, the  
4 debtor ought to raise the conflict issue. If there's a  
5 bankruptcy issue that's relevant to the Property Damage  
6 Committee, that's why there's a Property Damage Committee.  
7 They ought to be raising the issue, the bankruptcy issue. If  
8 it's also relevant to the ZAI claimants, then they can raise or  
9 log onto or do whatever they choose with respect to that same  
10 issue.

11 But I think the construct was that as to the unique  
12 ZAI negotiations, and issues, the problem that you faced  
13 earlier was that the committee has, as Mr. Scott indicated  
14 earlier, not felt comfortable making the representation of the  
15 whole ZAI community, and you folks did, so that's why you were  
16 special counsel for the objection to claim process that went  
17 forward. I thought the same essential role was what you were  
18 talking about carrying out, and what the debtor had essentially  
19 proposed to carry forth at its expense.

20 So, I -- folks, talk. I think maybe you were on the  
21 same page and not realizing it.

22 Mr. Sakalo?

23 MR. SAKALO: Good morning, Your Honor. Jay Sakalo on  
24 behalf of the Property Damage Committee.

25 I think Your Honor's comments just now, we --

1 clarifies the issues as to what you were viewing the role as  
2 special counsel to be for ZAI claimants. There were some  
3 additional issues with regard to the proposed order that the  
4 debtors circulated to us. I don't think Mr. Bernick's  
5 characterization of Mr. Baena's response is accurate.

6 There was a colloquy back and forth between the  
7 committee and the debtors in response to the proposed order, it  
8 was in response to the debtors' answers that Mr. Baena advised  
9 that it was no longer -- the order wasn't acceptable to Mr.  
10 Scott, Mr. Westbrook or to the Property Damage Committee. We  
11 hear you, we will continue those conversations.

12 But I'll note, Mr. Bernick appeared to be very  
13 careful in saying that if Mr. Westbrook or Mr. Scott need  
14 bankruptcy advice, they can consult with Mr. Baena and with me.  
15 But if they were going to come to court and argue issues, he  
16 wasn't so clear as to whether the debtors believed we still  
17 have that authority.

18 In their response to our inquiry about that, they  
19 said they didn't think we should have any role whatsoever with  
20 respect to ZAI interests. And so I just want the Court to be  
21 aware that that's the rub that will need to be worked out if  
22 we're going to be able to proceed going forward.

23 THE COURT: Well, the committee, so far, has, for the  
24 most part, wiped its hands of the ZAI claimant interest. I  
25 mean --

1 MR. SAKALO: Well --

2 THE COURT: -- that's what the committee's position  
3 has been. So, I --

4 MR. SAKALO: It has been with respect to the  
5 litigation issues, but not with respect to the pure bankruptcy  
6 issues.

7 THE COURT: That's right.

8 MR. SAKALO: So, the debtors' response was "all ZAI  
9 interests." So, I just wanted the Court to be aware of that  
10 issue.

11 THE COURT: Okay. Well, you know, the committee -- I  
12 don't think the debtor is in the position of disenfranchising  
13 the committee. That's not the debtors' role.

14 MR. SAKALO: Thank you, Your Honor.

15 THE COURT: Okay. Mr. Scott?

16 MR. SCOTT: Thank you, Your Honor. I'll be very  
17 brief.

18 Counsel for Grace, I think, just proved my point and  
19 simultaneously evaded the genuine issue that's before this  
20 Court. We just heard a whole flurry of reasons why the Court  
21 may not wish to maintain a class action during the course of  
22 these bankruptcy proceedings, skipping over the issue as to  
23 whether there is authority to file the proof of claim and  
24 attempt to defend it.

25 There was a concern that there would be no notice in

1 23(b)(2). There's a little bit of hypocrisy here. As counsel  
2 for the Washington class, which required no notice, we fought  
3 for a year to have a notice issued over Grace's objection. I  
4 remember being before the Court on -- I think the fifty hearing  
5 trying to have a notice issued to inform homeowners. And --  
6 and, again, quarreling about the picture and raising to the  
7 Court the prospect that this was all an effort to delay because  
8 of the prospects of a bankruptcy. The Court asked counsel, is  
9 there a prospect of bankruptcy? And the answer was, I don't  
10 know anything about that. And within 14 days, they filed  
11 bankruptcy.

12 If this Court thinks that notice ought to be issued,  
13 I would say, thank God, and we would happily issue notice.

14 He says 23(b)(3), it's -- it's 3rd Circuit Rule that  
15 you can't certify 23(b)(2) where you're seeking damages.

16 Well, first of all, that was the very subject that  
17 was addressed by the Washington court, whether this action is  
18 an equitable action or is a damages action.

19 If this Court believed the argument that Mr. Bernick  
20 just made, the only consequence would be the Court would say,  
21 your class action cannot obtain compensatory relief for these  
22 individuals, that must be done individually. Had -- had the  
23 Washington court ruled that we could not seek compensatory  
24 relief, one of two things would have happened. We either would  
25 have jettisoned it as a remedy, or changed it into a 23(b)(3)

1 where you could.

2 So, it's a legitimate question, but it is not a  
3 reason to close the courthouse doors so that we can't even  
4 argue about it. He says, the time is now. Well, I agree, but  
5 I need to be here with my client representing my client to  
6 argue about it.

7 He says, opt out. He's -- suddenly there's this  
8 strong desire to represent the Zonolite claimants so the poor  
9 people cannot opt out. If the Court believed that there should  
10 be a right of opt out, the Court can provide a right of opt  
11 out.

12 It may be that a court in this context will say, some  
13 individuals filed individual proofs of claim, at law claims,  
14 they should have a right to pursue those on an individual  
15 basis, and I will deem those individuals as not part of the  
16 class, that might be a remedy. But we don't get to argue about  
17 that until we have the claimant here attempting to defend the  
18 claim that they have brought.

19 There is this dead cat argument which had to do with  
20 -- which -- I think we just talked about which had to do with  
21 you can't deal with damages within 23(b)(2), that isn't  
22 correct. Were it correct, it -- it would simply be corrected  
23 by making it 23(b)(3) or by eliminating that as a remedy that  
24 we could seek as class counsel.

25 There is the argument that -- I listened with -- with

1 great interest to Mr. Bernick's discussion of the civil rules.  
2 Because if there's anyone who ought to be accused of being  
3 imaginative, and in a positive fashion, it's -- it's -- it's  
4 Mr. Bernick. And I listened to his discussion of Rule 9014,  
5 and its relationship with 7023, and I kept waiting for the  
6 punch line, and there wasn't one.

7 That's correct. The -- the procedure is Rule 9014  
8 provides that the court may apply other rules, including 7023,  
9 to any stage of the proceedings. And the stage of the  
10 proceedings that we are now is just the filing of a proof of  
11 claim.

12 And the Kraft opinion squarely addressed that issue  
13 and concluded that a pre-certified class, and their  
14 representative, is a fiduciary, therefore, an agent and,  
15 therefore, has a right to file that proof of claim.

16 The court is functionally using Rule 9014 at this  
17 stage of the proceeding to acknowledge Rule 23, which provides  
18 for an agency relationship between a designated representative  
19 and a class, and that's all. And no more than that. That's  
20 all that we are seeking.

21 And then, having recognized their right to file their  
22 class, we have to -- we will deal with all the issues that  
23 arise by virtue -- by virtue of the -- of the class.

24 The Kraft opinion, Footnote 14. The only thing  
25 Footnote 14 said is some courts have argued -- and we recognize

1 that even though it was pre-certified, the Court won't  
2 recognize it because counsel filed the motion too late. Well,  
3 doubtlessly, but that's not at issue here. That -- Footnote 14  
4 is -- is smoke and mirrors.

5 The only question, the only issue before this Court  
6 is whether my clients can file a claim for a community of  
7 people they have responsibility for; they either can or they  
8 can't.

9 If the Court permits that to be filed, we would be  
10 happy, we would invite very prompt argument on all the panoply  
11 of issues they might want to raise where they try to convince  
12 the Court that this class, while it is -- the proof of claim  
13 was recognized, it ought not to proceed as a class action.

14 THE COURT: I'm sorry, say that again?

15 MR. SCOTT: Let me say it this way. Rule 23, which  
16 we are incorporating, has two provisions: One is 23(a), the  
17 other's 23(b). And there's a difference between the two that's  
18 not often acknowledged. Rule 23(a) has to do with the  
19 circumstances under which a class can be filed. And (b) has to  
20 do with the circumstances under which it can be maintained.

21 Right now, we are only at the -- the question of can  
22 it be filed. And we are saying because we have already  
23 established all of the elements for certification, and we have  
24 an order, it can be filed. This Court is empowered to make a  
25 determination that it cannot be maintained at any point in the

1 proceeding, just as the Superior Court in Spokane, Washington  
2 could have. Judge Kathleen O'Connor, in certifying that class,  
3 is not -- is not hamstringing herself from making a different  
4 determination at any stage in those proceedings, and we're not  
5 asking the Court to handcuff itself either.

6           What we -- we're -- we're -- I'm only asking for the  
7 opportunity to be heard, which is the second element of due  
8 process. Not just notice, but a meaningful opportunity to be  
9 heard.

10           And the last thing I'll say is the -- the In Re:  
11 American Reserve case, which is the most cited case having to  
12 do with the circumstances under which a court -- a Bankruptcy  
13 Court should embrace class actions, said there's -- when there  
14 is a perfect storm of three elements, it's the classic case  
15 where class can't be of value. Where the claimants are  
16 unknown, which is true here, where they are unknowing and,  
17 therefore, may not recognize their right to file a claim, which  
18 we believe the factual record before this Court demonstrates.  
19 And thirdly, where their claims are of such value that as a  
20 practical matter, they cannot bring and defend a claim. And  
21 all three of those things are true here.

22           And for that reason, we ask that the Court merely  
23 recognize Marco Barbanti and Ralph Bush are agents, they are  
24 fiduciaries. They, therefore, have the authority to file a  
25 claim. And we will see whether they can do they say they can

1 do. Demonstrate that this claim withstands all of the  
2 challenges to the claim that the -- that a debtor brings,  
3 proven meritorious, and, in fact, proven a bellwether as to how  
4 all Zonolite claims can be resolved, and that's all that we're  
5 asking at this time.

6 Thank you, Your Honor.

7 THE COURT: Ms. Cabraser?

8 MS. CABRASER: I can't resist taking a swing at that  
9 dead cat, Your Honor.

10 (Laughter)

11 MR. BERNICK: Breathe some life into that poor thing.

12 MS. CABRASER: I think it's -- I think the cat is  
13 very much alive. They actually have nine lives, and this cat  
14 is on life number one.

15 Your Honor --

16 UNIDENTIFIED ATTORNEY: That's -- that's exactly our  
17 concern.

18 MS. CABRASER: Well, and Your Honor -- and Your Honor  
19 holds the key to addressing that concern. Because under Rule  
20 7023, you will be the one making further orders with respect to  
21 the maintenance, the conduct, the alteration, the expansion,  
22 the typography of the ZAI class claim. You were told that the  
23 dead cat was the non-opt out provision of Rule 23(b)(2). And  
24 there can be no -- no due process because there's no opt out,  
25 there's no notice, there's no this, there's no that.

1           In fact, Federal Rule 23, which you would be  
2 operating under as 7023, provides in any class certified under  
3 Rule 23(b)(1), which is the limited fund class, the equivalent  
4 of bankruptcy, by the way, or (b)(2), the Court may direct  
5 appropriate notice to the class, that's Rule 23(c)(2)(A). And  
6 Rule 23(c)(1)(C) says, "An order that grants or denies class  
7 certification may be altered or amended before final judgment."

8           So, if the Barbanti class, as certified by the  
9 Washington court under the precise same provisions of  
10 Washington Rule 23 is Federal Rule 23, was wrong or  
11 insufficiently omniscient with respect to what would happen in  
12 these proceedings, this Court will be the Court to correct and  
13 improve the situation through notice, through amendment,  
14 through expansion, by appointing additional representatives or  
15 counsel. And, by the way, by allowing an opt out right, the  
16 Federal jurisprudence of Rule 23(b)(2) says, "Courts can, in  
17 the exercise of their equity jurisdiction," and this is an  
18 equity court, "decide if it's appropriate or necessary for due  
19 process in a particular case to certify under (b)(1) or (b)(2)  
20 and allow opt outs."

21           Now, one might ask the practical question to where  
22 would one opt out? We are in bankruptcy. The point of  
23 bankruptcy is that you can't escape. And because you can't  
24 escape, your due process rights to assert your claims and to  
25 have them addressed in a fair, as well as efficient way, is all

1 important.

2 So, if the point is that there may be someone who has  
3 larger than average damages, who really wants to assert their  
4 own claim and take Mr. Bernick to trial, and doesn't want to  
5 rely on class counsel, the remedy is not the nuclear option, or  
6 using an atomic bomb to kill a fly. The option is to  
7 accommodate, since we're in a zoological mode, the fly. And  
8 the Court accommodates that person under Rule 23(d)(2) which  
9 enables the Court to allow intervention, to allow appearance  
10 through individual counsel, to allow individual trials of  
11 individual issues within the construct of the class action. If  
12 the class action is the best solution for the most claimants,  
13 you needn't abandon it or deny it or decertify it because for  
14 some individuals within the class, something else works better  
15 for them. Within your overall ongoing jurisdiction, all of  
16 those interests can be accommodated.

17 Mr. Bernick's Amchem argument was really a catch 22  
18 argument because the ZAI claimants are all about Amchem. What  
19 we want to do in this process is exactly what the Supreme Court  
20 commanded in Amchem, which is "to provide structural  
21 assurances," that's the quote from Amchem, of adequate  
22 representation at every stage of the proceeding. And you have  
23 seen at every stage of the proceeding completely dedicated,  
24 loyal representation of ZAI interest.

25 Mr. Bernick argues that because we don't already have

1 a nationwide class certified, there must be some conflict  
2 between the certified class and the yet to be certified class.  
3 Or because we represent Washington residents, we cannot  
4 represent other.

5 The solution is embodied in Amchem. If you need  
6 additional classes or subclasses to provide structural  
7 assurances, they can and should be certified. The problem with  
8 Amchem that could not be resolved within the class mechanism,  
9 as the majority saw it, was that in Amchem, a pre-bankruptcy  
10 settlement, there hadn't been representation of future  
11 claimants at any stage of the negotiations that led to the  
12 settlement. Here the ZAI class, the ZAI claim has been an  
13 inherently future claim, and it has been represented throughout  
14 these proceedings by the counsel you see before you.

15 The Washington State certification does not  
16 predestine or govern everything this Court does under Rule  
17 7023. But I think it's wrong to argue that because that was  
18 done in the State Court under state law, it should be utterly  
19 ignored. Bankruptcy Courts honor and implement and enforce  
20 State Court concepts, State Court laws, State Court judgments.  
21 Breach of contract is a state law claim. Most creditors come  
22 into Bankruptcy Court with state law claims. Corporations are  
23 creditors in Bankruptcy Court, and corporations are creatures  
24 of state, not federal, law.

25 So, this Court may appropriately grant the specific

1 motion before it today without differentiating or  
2 discriminating against the fact that the Barbanti class was  
3 certified under Washington Rule 33 by a State Court.

4 The courts which honor class proofs of claim and  
5 enable representatives of certified classes to file such proofs  
6 of claim, subject to ongoing Rule 7023 proceedings, the Zenith  
7 case, and the Kaiser International case from this District  
8 don't make such distinctions.

9 This proceeding is the proceeding that the Supreme  
10 Court in Ortiz, the other case Mr. Bernick mentioned from the  
11 Supreme Court, thought might be superior from the standpoint of  
12 due process, to a class settlement in which the defendant  
13 claiming a limited fund nonetheless made only token payment to  
14 a mandatory class; not all or nearly all of its assets.

15 These proceedings exist because Grace has declared  
16 that its claims exceed -- the claims against it, its  
17 liabilities exceeds its assets and there isn't enough to go  
18 around. It's the quintessential limited fund situation from  
19 which any federal or state court would conclude that opt outs  
20 could not be allowed, and that allowing opt outs would violate,  
21 not accommodate due process.

22 THE COURT: Wait, I'm sorry, can you back up because  
23 what I just heard for most of yesterday was how the debtor is  
24 returning 1.6 to \$2 billion in equity. So, I don't -- I mean  
25 it's disputed, I think, whether the debtor is or isn't solvent,

1 but I -- as long as the debtor is returning 1.6 to \$2 billion  
2 in equity, I'm having some difficulty saying that there aren't  
3 sufficient funds to, in quotes, "go around" assuming that the  
4 settlement works. If I have to get into an estimation hearing,  
5 then I don't know what the outcome of that would be. I'm not  
6 called on to determine that right now.

7 MS. CABRASER: Understood, Your Honor. And that's a  
8 fair point, and we're not asserting that Grace is or must be a  
9 limited fund. The only point I was making is that whether or  
10 not this Court should accommodate individuals within the ZAI  
11 class who might wish to, quote/unquote, "opt out" to present  
12 their claims before this proceeding in some format other than a  
13 class action, is discretionary. You can do it, whether the  
14 class is certified under Rule 23(b)(1), (b)(2) or (b)(3), and  
15 to determine whether opt outs should or should not be allowed  
16 is simply a matter of weighing the equities. The Rule 23  
17 procedures are sufficiently flexible to enable the Court to do  
18 that. Rule 23 isn't the gotcha rule, it isn't a rule that says  
19 because plaintiffs came in and didn't ask for the precisely  
20 correct class under the precisely correct subsection of the  
21 rule, they're not entitled to class relief.

22 It is for the Court to determine the scope of the  
23 class, the definition of the class, the claims that are  
24 included in the class, whether and to what extent there will be  
25 notice, and whether and to what extent there will be opt outs,

1 and who the representative plaintiffs and class counsel will  
2 be.

3 We are suggesting to Your Honor this morning that you  
4 have a tremendous head start in that process, which can be  
5 completed expeditiously through follow-on motions because of  
6 the preexistence of the Barbanti class and the dedicated and  
7 adequate representation of Barbanti class representatives and  
8 counsel on behalf of ZAI claimants as a whole throughout those  
9 proceedings. It is a valuable foundation upon which to build  
10 the remaining components of an overall solution of this matter.

11 MR. BERNICK: I just have a couple very quick  
12 comments, Your Honor, if that's permissible.

13 THE COURT: All right.

14 MR. BERNICK: I know this won't be going back with  
15 you to Pittsburgh, so is that okay if I (indiscernible - not at  
16 microphone).

17 (Pause)

18 (MR. BERNICK IS NOT SPEAKING AT A MICROPHONE)

19 MR. BERNICK: In their brief and in their motion, the  
20 ZAI claimants asked for two things: They asked for recognition  
21 of the certified Washington class action and the proof of claim  
22 form filed on behalf of that class, that's what they asked for.

23 And -- so, there were two things that were on the  
24 table: One was the claim -- the claim form, class form. And  
25 the other was the class -- the Washington class (b)(2).

1           We know that in connection with the Washington class  
2 (indiscernible) here, to get permission to do this, they have  
3 to deal with the 9014 "may" issue. And we know that with  
4 respect to getting the class, somebody had to apply what was a  
5 version of Rule 23, and, in this case (d)(2). And this is all  
6 of what they asked for. And even in citing the Kraft decision,  
7 they were careful to say this, "In determining whether Marco  
8 Barbanti and Ralph Bush are designated of a certified  
9 class, who will file a proof of claim on behalf of the class  
10 they represent, the Bankruptcy Court is not called upon to re-  
11 litigate," not litigate, "re-litigate the class certification  
12 determinations previously made by the certifying court. As the  
13 Court reasons In Re: Kraft," and there's some language and then  
14 the footnote which they cite, it says, "Absent extraordinary  
15 circumstances, this Court will accept a prior judicial  
16 determination of Rule 23."

17           And, in fact, in the Craft case, that is exactly what  
18 the court did. The court did conflate 9014 analysis with Rule  
19 23 application and concluded that the -- the Kraft class is  
20 already certified. That is this was not simply approval to  
21 file the claim form. This was adoption of the Kraft previously  
22 certified decision issued by a federal court.

23           So, coming in here today, there were, therefore, two  
24 things that were on the table for the Court to address:

25           One was 9014 (indiscernible) and (d)(3) -- (d)(2),

1 both of these were before the court.

2           We now have the suggestion that all of this is wrong,  
3 and that, in fact, the only thing that the Court is really  
4 being asked to do is this. That is all we're doing is asking  
5 Your Honor to give us permission to file the form. And that  
6 some other day, there will be an assessment about whether the  
7 case really should be a (b)(2) case. And that if it turns out  
8 that down the road it doesn't have to be -- it shouldn't be a  
9 (b)(2) case, because I think we can all predict has to be the  
10 outcome, then we're going to go through, by virtue of  
11 amendment, to (b)(3). That is the amendment (indiscernible).  
12 And, of course, that's not right. You have to get a  
13 certification under a provision of the rule. So, in order --  
14 you can't simply amend and say, well, I wish it wasn't (b)(2)  
15 after all, we're going to decertify that and, by amendment,  
16 make it (b)(3) because we have to have a hearing under (b)(3).  
17 We have to give notice of a hearing under (b)(3) because we  
18 have to provide an opt out right.

19           So, in fact, what you would have is a motion under  
20 (b)(3). And if that motion is then granted, and then somewhere  
21 down the road in this case have opt outs, then the question is,  
22 well, are they bound by the bar date? So, now we have people  
23 who filed by the bar date and they're out there, and we're now  
24 God knows how close to or, indeed, now pushing, pushing back  
25 confirmation, which they're -- is going to be the next thing

1 they're going to be asking about. That's all designed to do is  
2 push back and push back and delay. We're going to then have to  
3 ask the question of how to reconcile the opt out right with the  
4 people who filed by the bar date. Which is exactly -- exactly  
5 the problem that has led many courts to say that where there is  
6 a bar date, there shouldn't be a class.

7 So, we have not nine lives of the cat, but that poor  
8 kitchen at least is going to go through three or four different  
9 iterations all before we have a confirmation hearing? I don't  
10 think so. I don't think that they should be permitted to  
11 string us along like this. I don't think that they should be  
12 permitted, the debtor doesn't believe they should be permitted  
13 to place before the Court today two requests: One is to  
14 recognize a certified class under (d)(2). And the second is to  
15 have the claim form recognized. I don't think they should be  
16 permitted to put both those matters before the Court and then  
17 say, oh, well, we were really only asking for permission to  
18 file the form, and whatever that class might be down the road,  
19 (b)(2), (b)(3), who knows, Your Honor, you're so good and you  
20 have so much under the rules, you'll determine that.

21 In fact, they've put more before the Court. They've  
22 put the class form and they've put the recognition of the  
23 class. And what that then implicates are two things: One is  
24 (b)(2). And (b)(2) is squarely before the Court today. And  
25 then critically, 9014, the discretionary analysis, and that's

1 why I urge that the Court not only focus on the dead cat in the  
2 room, which is (b)(2), and the Asbestos Schools case, but focus  
3 on all of those different factors that we outlined about why,  
4 given the context -- particularly context of this case, the  
5 Court should say, no, I am not going to exercise my discretion  
6 to apply 7023, that this is not the right case for it.

7           Because if Your Honor doesn't do that, then sure as  
8 we're sitting here, there's now going to be a motion, there  
9 will be class proof of claim filed, it will be a (b)(3) proof  
10 of claim, and then it will move. Then they will move to  
11 certify based upon that class claim a (b)(3) class. We know  
12 they're going to do it.

13           So, I think it's particularly important that the  
14 matter is before the Court under 9014. The Court is seized of  
15 the issues under Rule 9014, let's get those issues resolved so  
16 that we can get on with the rest of the case.

17           THE COURT: Any parting comments, gentlemen or Ms.  
18 Cabraser?

19           MR. SCOTT: We appreciate your patience and your  
20 time.

21           MS. CABRASER: Thank you, Your Honor.

22           MR. SCOTT: Thank you.

23           THE COURT: All right. We're adjourned. Thank you.

24           MULTIPLE SPEAKERS: Thank you.

25           (Proceedings Adjourn at 12:04)

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4 I, Karen Hartmann, certify that the foregoing is a  
5 correct transcript to the best of my ability, from the  
6 electronic sound recording of the proceedings in the above-  
7 entitled matter.

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Date: July 26, 2008

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